JANUARY-DECEMBER-1970

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D. C. 20240

INDEX-DIGEST
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Mitchell Melich, Solicitor

INDEX-DIGEST
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This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1 through December 31, 1970. It supersedes the index-digest for January-September 1970.

Decisions and opinions cited as appearing in 77 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of the Solicitor.

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INDEX TO TABLES

CONTENTS

* * * * * * * * * * * *

SYMBOLS

A	- Appeal from Bureau of Land Management and from Geological Survey
IA	- Indian Appeals
IA-T	- Indian Appeal Tort
IBCA	- Interior Board of Contract Appeals
IBIA	- Interior Board of Indian Appeals
IBLA	- Interior Board of Land Appeals
M	- Solicitor's Opinion

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TABLE OF DECISIONS REPORTED

Page(s)

Page(s)

* * * * * * * * * * * *

TABLE OF OPINIONS REPORTED

* * * * * * * * * * * *

TABLE OF OVERRULED AND MODIFIED CASES

Bartel, John A., A-29664 (10/11/62); distinguished by A-30129 (11/9/64).

Clipper Mining Company (22 L.D. 527); no longer followed in part, 67 I.D. 417 (1960).

Clipper Mining Company, The v. The Eli Mining and Land Company et al. (33 L.D. 660); no longer followed in part. 67 I.D. 417 (1960).

Fults, Bill (61 I.D. 437); overruled, 69 I.D. 181 (1962).

Glassford, A.W. et al. (56 I.D. 88); overruled to extent inconsistent, 70 I.D. 159 (1963).

Gray, Eleanor A. et al., A-28710 (5/18/62); vacated as to Claim No. 4, A-28710 (Supp.) (5/7/64).

Hagood, L. N. et al., 65 I.D. 405 (1958) is overruled, 77 I.D. 166 (1970)

Kern County Land Company (On Reconsideration), IA-0168748, IA-0170927, and IA-0170928, approved by Under Secretary Carver, Oct. 25, 1965, will not be followed to the extent that it is inconsistent with this opinion.

Land Classification State of California, A-31022, Aug. 14, 1968 and Jan. 23, 1969, overruled to extent inconsistent, A-31022, Oct. 14, 1969.

Land Classification State of California, A-31022, Aug. 14, 1968 and Jan. 23, 1969, overruled to extent inconsistent, A-31022, Oct. 14, 1969, as amended Oct. 27, 1969.

Layne and Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled, in so far as it conflicts with Schweigert, Inc. v. United States, Ct. Cl. No. 26-66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA-534-12-65 (Mar. 29, 1968).

Luse, Jeanette L. et al., A-26589 (1/9/53); distinguished by Richfield Oil Corporation, A-29937 (6/9/64), 71 I.D. 243 (1964).

Manzonie, John and Adellie (IGD 615); distinguished, A-29334 (7/26/63).

Merritt-Chapman & Scott Corporation, IBCA-257 (6/22/61); distinguished, IBCA-274 (9/15/61).

Mikesell, Henry D., A-24112 (3/11/46); overruled to extent inconsistent, A-29103 (4/22/63).

Morgan, Henry S. et al., (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).

Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).

Opinion of Chief Counsel, July 1, 1914, (43 L.D. 339); explained, 68 I.D. 372 (1961).

Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).

Opinion of the Solicitor, October 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).

Opinion of Solicitor, 60 I.D. 436 (1950), will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).

Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, 64 I.D. 435 (1957), will not be followed to the extent that it conflicts with these views. M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14.

Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965)

Opinion of Solicitor, July 29, 1958 (M-36512) overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Solicitor, M-36767 (11/1/67), supplementing M-36599, 69 I.D. 195 (1962).

Opinion of Solicitor, Oct. 22, 1947 (M-36999); distinguished, 68 I.D. 433 (1961).

Opinion of Solicitor, Oct. 30, 1957 (64 I.D. 393); no longer followed, 67 I.D. 366 (1960).

Opinions of Solicitor, 10/27/58 and 7/20/59; overruled, 69 I.D. 110 (1962).

Phebus, Clayton (48 L.D. 128); overruled to extent inconsistent, 70 I.D. 159 (1963).

Ross, John R. et al., A-27259 (3/12/56) set aside in part; Robert C. and Mary V. Ellis, A-29185 (9/9/64).

Star Gold Mining Co., 47 L.D. 38 (1919); distinguished by U. S. v. Alaska Empire Gold Mining Co., A-30082 (7/16/64), 71 I.D. 273 (1964).

United States v. McClarty, Kenneth, 71 I.D. 331 (1964), vacated and case remanded, 76 I.D. 193 (1969).

* * * * * * * * * * * *

TABLE OF SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS

* * * * *

CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS BOTH PUBLISHED AND UNPUBLISHED

The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision or opinion, all the departmental decisions and opinions, beginning with January of 1955, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given; if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, the fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited.

Adler Construction Co., 67 I.D. 21 (1960) (Reconsideration)

Adler Construction Co. v. U.S., Cong. 10-60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970.

Allied Contractors, Inc., 68 I.D. 145 (1961)

Allied Contractors, Inc. v. U.S., Ct. Cl. No. 163-63. Stipulation of settlement filed March 3, 1967; compromised.

Estate of John J. Akers, 77 I.D. 268 (1970)

Dolly Custer Akers v. The Dept. of the Interior, Civil No. 907, D. Mont. Suit pending.

Estate of Albert Attocknie, IA-1442 (February 7, 1966)

Willis Attocknie v. Stewart L. Udall, Civil No. 1644-66. Dismissed with prejudice, 261 F. Supp. 876 (1966); rev'd., 390 F. 2d 686 (10th Cir. 1968); cert. denied, 393 U.S. 833 (1968).

State of Alaska
Andrew Kalerak, Jr., 73 I.D. 1 (1966)

Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall, Civil No. A-35-66, D. Alas. Judgment for plaintiff, October 20, 1966; rev'd., 396 F. 2d 746 (9th Cir. 1968); cert. denied, 393 U.S. 1118 (1969).

Harold Babcock, et al., A-30301 (June 16, 1965)

James Babcock, et al. v. Stewart L. Udall, Civil No. 1-66-8, S.D. Idaho. Judgment for defendant, June 24, 1969; no appeal.

E. H. Allen & Frank Melluzzo, A-30182 (July 9, 1964)

E. H. Allen & Frank Melluzzo v. Stewart L. Udall, Civil No. 1001, D. Ariz. Judgment for defendant, April 27, 1967; no appeal.

David C. Bagley, et al., A-30138 (December 29, 1964)

David C. Bagley, et al. v. Stewart L. Udall, et al., Civil No. 109-65, D. Utah. Judgment for plaintiff, June 13, 1966; decree of dist. ct. vacated, case remanded to be dismissed as moot, January 20, 1967, 10th Cir.; dismissed, April 24, 1967.

Leslie N. Baker, et al., A-28454 (October 26, 1960). On reconsideration Autrice C. Copeland, 69 I.D. 1 (1962).

Autrice Copeland Freeman v. Stewart L. Udall, Civil No. 1578, D. Ariz. Judgment for defendant, September 3, 1963 (opinion); aff'd., 336 F. 2d 706 (9th Cir. 1964); no petition.

Estate of Myron Bangs, Jr., IA-1327 (February 7, 1966)

Helen Pratt Matin, et al. v. Johnson, Supt., Osage Ind. Agency & Udall, Civil No. 6444, N.D. Okla. Sustained, June 2, 1967; dismissed, June 25, 1970.

Max Barash, The Texas Co., 63 I.D. 51 (1956)

Max Barash v. Douglas McKay, Civil No. 939-56. Judgment for defendant, June 13, 1957; rev'd. & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, December 18, 1958. Supplemental decision, 66 I.D. 11 (1959); no petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957) 65 I.D. 49 (1958)

Barnard-Curtiss Co. v. U.S., Ct. Cl. No. 491-59. Judgment for plaintiff, 301 F. 2d 909 (1962).

Eugenia Bate, 69 I.D. 230 (1962)

Katherine S. Foster & Brook H. Duncan, II v. Stewart L. Udall, Civil No. 5258, D. N.M. Judgment for defendant, January 8, 1964; rev'd., 335 F. 2d 828 (10th Cir. 1964); no petition.

Battle Mountain Co., A-29146 (January 31, 1963)

Battle Mountain Co. v. Stewart L. Udall, Civil No. 64-29, D. Ore. Per curiam decision, 255 F. Supp. 382 (1966); rev'd., 385 F. 2d 90 (9th Cir. 1967); cert. denied, 390 U.S. 957 (1968).

Bay Construction Co., et al., IBCA-77 (November 30, 1960)

Bay Construction Co., et al. v. U.S., Ct. Cl. No. 302-60. Dismissed with prejudice.

Sam Bergesen, 62 I.D. 295 Reconsideration denied, IBCA-11 (December 19, 1955)

Sam Bergesen v. U.S., Civil No. 2044, D. Wash. Complaint dismissed March 11, 1958; no appeal.

Estate of William Bigheart, Jr., IA-T-21 (August 8, 1969), IA-T-21 (Supp.) (September 4, 1969)

Velma Rose Bigheart, Surviving Spouse of William Bigheart, Jr., Deceased Unallotted Osage Indian v. John Pappan, Supt., Osage Indian Agency, et al., Civil No. 69-C-303, D. Okla. Order to Stay Proceedings issued May 15, 1970.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. Stewart L. Udall, Civil No. 2109-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

F. W. C. Boesche, A-27997 (August 5, 1959)

Fenelon Boesche v. Fred A. Seaton, Civil No. 2463-59. Judgment for defendant, November 23, 1960 (opinion); aff'd., 303 F. 2d 204 (1961); cert. granted, 371 U.S. 886 (1962); aff'd., 373 U.S. 472 (1963).

Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alas. Judgment for defendant, June 30, 1970; no appeal.

Brookhaven Oil Co., A-27459 (July 29, 1957)

Brookhaven Oil Co. v. Fred A. Seaton, Civil No. 2120-57. Judgment for plaintiff, October 1, 1958; no appeal.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. Stewart L. Udall, Civil No. 3352-62. Judgment for defendant, September 17, 1963; rev'd., 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. Stewart L. Udall, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); appeal docketed.

Buell Brothers, A-30679 (March 29, 1967)

U.S. v. Carl M. Buell & Lloyd F. Buell, d/b/a Buell Bros., U.S. Atty. No. N-371. Compromised, October 23, 1968.

Bushman Construction Co., IBCA-103 (March 29, 1957)

Bushman Construction Co. v. U.S., Ct. Cl. No. 437-57. Petition dismissed, 164 F. Supp. 239 (1958).

Zelph S. Calder, A-30039 (September 18, 1963)

Zelph S. Calder v. Stewart L. Udall, Civil No. C-219-63, D. Utah. Judgment for defendant, August 10, 1964; no appeal.

The California Co., 66 I.D. 54 (1959)

The California Co. v. Stewart L. Udall, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd., 296 F. 2d 384 (1961).

In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board, June 3, 1968 appealed by Secretary July 5, 1968, 75 I.D. 289 (1968).

Cameron Parish Police Jury v. Stewart L. Udall, et al., Civil No. 14,206, W.D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued November 5, 1969.

Jack E. Carl, A-27870, A-27900 (April 23, 1959)

Jack E. Carl v. Fred A. Seaton, Civil No. 3069-59. Judgment for defendant, June 20, 1961; aff'd., 309 F. 2d 653 (1962).

Carson Construction Co., 62 I.D. 422 (1955)

Carson Constrtction Co. v. U.S., Ct. Cl. No. 487-59. Judgment for plaintiff, December 14, 1961; no appeal.

C. F. Lytle Co., IBCA-172 (September 30, 1958)

C. F. Lytle Co. v. U.S., Ct. Cl. No. 174-59. Compromised.

Estate of George Chahesenah, IA-T-4 (June 20, 1967)

Viola Atewooftakewa (Tate), et al., v. Udall, Civil No. 67-323, W.D. Okla. Judgement for plaintiff, 277 F. Supp. 464 (1967); rev'd. & remanded to dismiss for want of jurisdiction, 407 F. 2d 394 (10th Cir. 1969); cert. granted, 396 U.S. 815 (1969); rev'd., 397 U.S. 598 (1970).

Chargeability of Acreage Embraced in Oil and Gas Lease Offers, 71 I.D. 337 (1964) Shell Oil Co., A-30575 (October 31, 1966)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulation of dismissal filed August 19, 1968.

Chemi-Cote Perlite Corp. v. Arthur C. W. Bowen, 72 I.D. 403 (1965)

Bowen v. Chemi-Cote Perlite, No. 2 CA-Civ. 248, Ariz. Ct. App. Decision against the Dept. by the lower court aff'd., 423 P. 2d 104 (1967); rev'd., 432 P. 2d 435 (1967).

Christy Corp., IBCA-461 & 569 (June 20, 1966)

Christy Corp. v. U.S., Ct. Cl. No. 291-66. Judgment for defendant, Harbor Boat Building Co., 387 F. 2d 395 (1967); compromised, July 10, 1968.

U.S. v. Harco Engineering, A Division of Harbor Boat Building Co., Civil No. 68-827-S, D. Cal. Dismissed with prejudice, February 24, 1970.

Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. U.S., Cong. Ref. 5-68. Suit pending.

Clear Gravel Enterprises, Inc., A-27967, A-27970 (December 29, 1959)

The Dredge Corp. v. E. J. Palmer, No. 366, D. Nev. Judgment for defendant, September 25, 1962; remanded, 338 F. 2d 456 (9th Cir. 1964); judgment for plaintiff, August 8, 1966; rev'd. and remanded with direction to enter judgments for defendants, 398 F. 2d 791 (9th Cir. 1968); cert. denied, 393 U.S. 1066 (1969).

P. Cobb, A-29769 (May 27, 1964)

P. and Osro Cobb v. U.S., Civil No. 967, W.D. Ark. Motion to dismiss denied, 240 F. Supp. 574 (1965); dismissed, January 17, 1966.

Mrs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. U.S., Civil No. 3158, D. R. I. Compromised.

Barney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson, et al. v. Stewart L. Udall, Civil No. 63-26-Civ.-Oc, M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd., 428 F. 2d 1046 (5th Cir. 1970); petition for cert. filed November 15, 1970.

Columbian Carbon Co., Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. Fred A. Seaton, Civil No. 3233-56. Judgment for defendant, January 9, 1958; appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

Commercial Metals Co., IBCA-99 (August 27, 1959)

Commercial Metals Co. v. U.S., Ct. Cl. No. 458-59. Judgment for plaintiff, June 16, 1966.

Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yevonne Clairmont Baciarelli v. Walter J. Hickel, Civil No. C-70-2200, D. Cal. Suit pending.

Consolidated Mines & Smelting Co., et al., A-30760 (September 19, 1967)

H. D. Brown v. U.S. & Walter Hickel, Civil No. 69-2332-F, D. Cal. Dismissed with prejudice, March 20, 1970.

Appeal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. Stewart L. Udall, et al., Civil No. 366-62. Judgment for defendant, April 29, 1966; aff'd., February 10, 1967; cert. denied, 389 U.S. 839 (1967).

Autrice C. Copeland, See Leslie N. Baker et al.

William D. Cornia, et al., Wyoming 4-63-1, etc., Utah 1-63-1, etc. (August 25, 1965)

William D. Cornia, et al. v. Stewart L. Udall, Civil No. 4-66, N.D. Utah. Dismissed with prejudice, September 1, 1967.

Appeal of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co., et al. v. U.S., Ct. Cl. 119-68. Suit pending.

Elizabeth Barndt Crouse, et al., A-30542 (March 7, 1968)

Elizabeth Barndt Crouse, et al. v. K. Ranch, Inc., Udall, et al., Civil No. R-2063, D. Nev. Dismissed without prejudice, April 15, 1969; no appeal.

Estate of George Daniels, IA-1295 (November 2, 1965)

Elizabeth Daniels, et al. v. Johnson, Supt., Osage Indian Agency & Udall, Civil No. 6443, N.D. Okla. Dismissed with prejudice, January 9, 1967.

Oma Belle Day, et al., AA-5702 (December 30, 1969)

Oma Belle Day v. Walter J. Hickel, et al., Civil No. A-9-70, D. Alas. Judgment for defendant, December 15, 1970.

John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. Clarence A. Davis, Civil No. 2125-56. Judgment for defendant, June 20, 1957; aff'd., 259 F. 2d 780 (1958); cert. denied, 358 U.S. 835 (1958).

Nelson E. Devine & Raymond E. Bryant, A-30435 (April 28, 1965)

U.S. v. Raymond E. Bryant, Civil No. 9929, E.D. Cal. Remanded to Dept. for exercise of discretion, September 10, 1969.

The Dredge Corp., 64 I.D. 368 (1957)
65 I.D. 336 (1958)

The Dredge Corp. v. J. Russell Penny, Civil No. 475, D. Nev. Judgment for defendant, September 9, 1964; aff'd., 362 F. 2d 889 (9th Cir. 1966); no petition. See also Dredge Co. v. Husite Co., 369 P. 2d 676 (1962); cert. denied, 371 U.S. 821 (1962).

Lawrence Edwards, A-30696, A-30705 (April 21, 1967)

Lawrence Edwards v. Stewart Udall, Civil No. 2714, D. Mont. Rev'd. & remanded, November 18, 1968; stipulation of dismissal & order filed August 4, 1970.

Henry J. Ernst, A-27196 (November 7, 1955)

Henry J. Ernst v. Secretary of the Interior, Civil No. 9303, D. Alas. Return of service quashed & complaint dismissed, December 28, 1956 (opinion); aff'd., 244 F. 2d 344 (9th Cir. 1957).

John J. Farrelly, et al., 62 I.D. 1 (1955)

John J. Farrelly & The Fifty-One Oil Co. v. Douglas McKay, Civil No. 3037-55. Judgment for plaintiff, October 11, 1955; no appeal.

Carl E. Forsberg, et al., A-29158 et al., (August 19, 1963)

Carl E. Forsberg v. Stewart L. Udall, Civil No. 63-472, D. Ore. Judgment for defendant, 255 F. Supp. 382 (1966); appeal dismissed, October 13, 1966. See Linn Land Co. v. Stewart L. Udall.

Robert K. Foster, et al., A-29857 (June 15, 1964)

Robert K. Foster, et al. v. Manager, Riverside Land Office, et al., Civil No. 64-1110-WM, S.D. Cal. Judgment for defendant, 296 F. Supp. 1348 (1966); no appeal.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, Executrix of the estate of T. Jack Foster v. Stewart L. Udall, Boyd L. Rasmussen, Civil No. 7611, D. N.M. Judgment for plaintiff, June 2, 1969; no appeal.

Franco Western Oil Co., et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. Fred A. Seaton, Civil No. 2810-59. Judgment for plaintiff, August 2, 1960 (opinion); no appeal.

See Safarik v. Udall, 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

Myrtle A. Freer, et al., A-29221 (April 2, 1963)

Willis W. Ritter v. Walter Hickel, et al., Civil No. 1-70-74, D. Idaho. Suit pending.

Coral V. Funderburg, A-30514 (June 14, 1966)

Coral V. Funderburg v. Stewart L. Udall, et al., Civil No. 2818 ND, S.D. Cal. Dismissed with prejudice, February 15, 1967; aff'd., 396 F. 2d 638 (9th Cir. 1968); no petition.

Gabbs Exploration Co., 67 I.D. 160 (1960)

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 219-61. Judgment for defendant, December 1, 1961; aff'd., 315 F. 2d 37 (1963); cert. denied, 375 U.S. 822 (1963).

Bernard J. & Myrle A. Gaffney, A-30327 (October 28, 1965)

Bernard J. & Myrle A. Gaffney v. Stewart L. Udall, Civil No. 3-66-22, D. Minn. Stipulated dismissal without prejudice, January 17, 1969; no appeal.

Stanley Garthofner, Duvall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. Stewart L. Udall, Civil No. 4194-60. Judgment for plaintiff, November 27, 1961; no appeal.

General Excavating Co., 67 I.D. 344 (1960)

General Excavating Co. v. U.S., Ct. Cl. No. 170-62. Dismissed with prejudice December 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. Stewart L. Udall, Civil No. 685-60. Judgment for defendant, June 20, 1961; motion for rehearing denied, August 3, 1961; aff'd., 309 F. 2d 653 (1962); no petition.

Charles B. Gonsales, A-27944 (April 22, 1959)

Charles B. Gonsales v. Frederick A. Seaton, Civil No. 2497-59. Plaintiff's amended complaint dismissed with prejudice, January 12, 1962; no appeal.

Charles B. Gonsales et al., Western Oil Fields, Inc., et al., 69 I.D. 236 (1962)

Pan American Petroleum Corp. & Charles B. Gonsales v. Stewart L. Udall, Civil No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

Charles B. Gonsales, A-29010 (March 27, 1963)

Charles B. Gonsales v. Stewart L. Udall, Civil No. 5378, D. N.M. Dismissed with prejudice, November 12, 1963.

John Gonzales, A-30604 (September 26, 1968)

John Gonzales v. Stewart Udall, Civil No. A-128-68, D. Alas. Order to Stay Proceedings for 6 months filed June 3, 1970.

Estate of George Green, IA-T-11 (June 7, 1968)

Lillian Crenshaw, et al. v. Secretary, Civil No. 68-317, W.D. Okla. Dismissed, February 4, 1969; no appeal.

Gulf Oil Corp., 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 2209-62. Judgment for defendant, October 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

Gustav Hirsch Organization, Inc., IBCA-175 (October 30, 1958)

Gustav Hirsch Organization, Inc. v. U.S., Ct. Cl. No. 416-59. Compromised.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

Guthrie Electrical Construction Co. v. U.S., Ct. Cl. No. 129-58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

L. H. Hagood, et al., 65 I.D. 405 (1958)

Edwin Still, et al. v. U.S., Civil No. 7897, D. Colo. Compromise accepted.

William Hall, et al., A-30849, A-30852, A-30857 (September 16, 1968)

William Hall & Diana Hall v. Secretary of the Interior, Civil No. A-169-68, D. Alas. Dismissed, July 25, 1969; no appeal.

Lester J. Hamel, A-28830 (September 17, 1962)

Lester J. Hamel v. Neal D. Nelson et al., Civil No. 8565, N.D. Cal. Judgment for defendant, December 13, 1963 (opinion); judgment entered February 11, 1964; appeal docketed February 14, 1964; dismissed by plaintiff, March 20, 1964.

Raymond J. Hansen, et al., 67 I.D. 362 (1960)

Raymond J. Hansen, et al. v. Stewart L. Udall, Civil No. 3902-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

Robert Schulein v. Stewart L. Udall, Civil No. 4131-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Raymond J. Hansen, A-30179 (March 5, 1965)

Mary L. Brandt and Natalie Z. Shell v. Stewart L. Udall, Civil No. 2659-ND, S.D. Cal. Dismissed, September 30, 1965; amended complaint filed November 15, 1965; judgment for defendant, June 7, 1966; dismissed for lack of jurisdiction, November 15, 1967; judgment for defendants, March 26, 1968; rev'd., 427 F. 2d 53 (9th Cir. 1970).

Mary L. Brandt & Natalie Z. Shell v. Stewart L. Udall, Civil No. 2715-ND, S.D. Cal. Dismissed, December 3, 1965.

Paul Harvey, et al., A-30552 (June 24, 1966)

Paul Harvey, Grace Ernest and Lalo Enriquez v. Stewart L. Udall, Civil No. 6753, D. N.M. Judgment for defendant, January 25, 1967; aff'd., 384 F. 2d 883 (10th Cir. 1967); no petition.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. U.S., Ct. Cl. No. 162-62. Stipulated judgment, July 2, 1965.

Hope Natural Gas Co., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

Boyd L. Hulse v. William H. Griggs, 67 I.D. 212 (1960)

William H. Griggs v. Michael T. Solan, Civil No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

Stanley W. Hutchinson v. Clyde W. Bishop, A-29693 (May 4, 1964)

Clyde W. Bishop v. Stewart L. Udall, Civil No. 1-65-54, D. Idaho. Judgment for plaintiff, July 7, 1966; no appeal.

Idaho Desert Land Entries - Indian Hill Group, 72 I.D. 156 (1965)

Wallace Reed, et al. v. Dept. of the Interior, et al., Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, September 3, 1965; dismissed, November 10, 1965; suit pending.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. Stewart L. Udall, Civil No. 3089-63. Dismissed with prejudice, March 27, 1968.

J. A. Jones Construction Co., et al., IBCA-233 (June 17, 1960)

Palisades Contractors, et al. v. U.S., Civil No. 2247, D. Idaho. Settled.

J. A. Terteling & Sons, 64 I.D. 466 (1957)

J. A. Terteling & Sons v. U.S., Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

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J. D. Armstrong Co., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. U.S., Ct. Cl. No. 490-56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

Jensen-Rasmussen, et al., IBCA-363 (March 14, 1963)

Jensen-Rasmussen & Co. v. U.S., Civil No. 5963, W.D. Wash. Judgment for defendant, February 24, 1964; no appeal.

Dale Johnson, A-30806 (September 17, 1968)

Dale Johnson v. Stewart L. Udall, Secretary of the Interior, Civil No. A-135-68, D. Alas. Stipulated dismissal, April 10, 1969; no appeal.

Kenneth J. Kadow, et al., A-30053 (October 5, 1964)

Kenneth J. Kadow, et al. v. Stewart L. Udall, Secretary of the Interior, Civil No. A-1-65, D. Alas. Judgment for defendant, September 7, 1967; appeal docketed, October 6, 1967; dismissed for lack of prosecution, February 2, 1968; no petition.

R. A. Keans, A-30183 (February 16, 1965)

R. A. Keans v. Stewart L. Udall, et al., Civil No. 2648-ND, S.D. Cal. Defendant's motion to dismiss granted, November 22, 1965; no appeal.

Estate of Kee-ah-tha-com-oke-quah, IA-974, 975 (September 16, 1965)

D. Q. (Bill) Couch v. Stewart L. Udall, Civil No. 66-282, W.D. Okla. Aff'd., 265 F. Supp. 848 (1967); aff'd., 404 F. 2d 97 (10th Cir. 1968); no petition.

John J. King, A-28543 (October 13, 1960)

John J. King v. Stewart L. Udall, Civil No. 68-61. Judgment for plaintiff, November 8, 1961; rev'd., 308 F. 2d 650 (1962); no petition.

John J. King, et al., Fairbanks 033268, 033279 (September 25, 1964)

John J. King, et al. v. Stewart L. Udall, Civil No. 2750-64. Judgment for plaintiffs, 266 F. Supp. 747 (1967); on May 4, 1967, a stipulation of voluntary dismissal with prejudice sgd. by the plaintiffs and all other parties.

John J. King, Dorothy W. King, Fairbanks 034577 (October 26, 1965)

John J. and Dorothy W. King v. Stewart L. Udall, Civil No. A-6-66, D. Alas. Dismissed with prejudice, April 24, 1968.

Barbara G. Kirk and Marjorie G. Wright
See Dean Kirk

Dean Kirk, A-29018a (April 26, 1963), Barbara G. Kirk and Marjorie G. Wright, A-30022 (August 20, 1963)

George M. Larsen, et al. v. Stewart L. Udall, Civil No. 1651, D. Nev. Stipulation covering seven land entries; four are dismissed as moot, three are dismissed with prejudice.

Anquita L. Kluenter, et al., A-30483, November 18, 1965
See Bobby Lee Moore, et al.

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall, et al., Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd., 432 F. 2d 328 (9th Cir. 1970); rehearing denied, November 5, 1970.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max Krueger v. Fred A. Seaton, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

James M. Krumtum and Cale M. Shearer, A-30838 (December 21, 1967)

James M. Krumtum & Cale M. Shearer v. Udall, et al., Civil No. 6567, D. Ariz. Judgment for defendant, January 6, 1970; no appeal.

Richard M. Lade, As Attorney in Fact for Santa Fe Pacific R.R., A-29121 (January 10, 1963)

Richard M. Lade, Attorney in Fact for Santa Fe Pacific R.R. v. Udall, et al., Civil No. 67-14, D. Ore. Judgment for defendant, 295 F. Supp. 265 (1968); aff'd., 432 F. 2d 254 (9th Cir. 1970).

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. Stewart L. Udall, Civil No. 2784-62. Judgment for defendant, March 6, 1963; aff'd., 324 F. 2d 428 (1963); cert. denied, 376 U.S. 907 (1964).

Langdon H. Larwill, et al., A-28697 (May 16, 1963)

Pacific Oil Co., a Corp. v. Stewart L. Udall, Civil No. 9406, D. Colo. Judgment for defendant, 273 F. Supp. 203 (1967); aff'd., 406 F. 2d 452 (10th Cir. 1969); cert. denied, 395 U.S. 978 (1969).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. Stewart L. Udall, Civil No. 474-64. Judgment for defendant, October 5, 1964; appeal voluntarily dismissed, March 26, 1965.

Perley M. Lewis and Mildred C. Lewis, A-28707 (December 30, 1963)

Perley M. Lewis, et ux. v. Stewart L. Udall, et al., Civil No. 5451 Phx., D. Ariz. Judgment for defendant, March 22, 1966; aff'd., 374 F. 2d 180 (9th Cir. 1967); no petition.

Perley M. Lewis, A-29572 (June 27, 1963)

Perley M. Lewis & Mildred C. Lewis v. Stewart L. Udall, Secretary of the Interior, Civil No. 5003 Phx., D. Ariz. Judgment for defendant, July 31, 1967; amended judgment for defendant, May 28, 1968; aff'd., 427 F. 2d 673 (9th Cir. 1970); cert. denied, January 11, 1971.

Milton H. Lichtenwalner, A-28909 et al. (June 15, 1962)

Duncan Miller v. Stewart L. Udall, Civil No. 2932-62. Judgment for defendant, July 15, 1963; no appeal.

Milton H. Lichtenwalner, et al., 69 I.D. 71 (1962)

Kenneth McCahan v. Stewart L. Udall, Civil No. A-21-63, D. Alas. Dismissed on merits, April 24, 1964; stipulated dismissal of appeal with prejudice, October 5, 1964.

Linn Land Co., A-28765 (July 12, 1962)

Linn Land Co., et al. v. Stewart L. Udall, Civil No. 63-264, D. Ore. Consolidated with Forsberg v. Udall, Schmand v. Udall & Property Management Co. v. Udall, Battle Mt. Co. v. Udall. Judgment for defendant, 255 F. Supp. 382 (1966), except per curiam dec. as to Battle Mountain which see. Stipulated dismissal on appeal, October 13, 1966.

Merwin E. Liss, et al., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; per curiam dec., aff'd., April 28, 1966; no petition.

Leland M. Lucas, A-29228 (December 10, 1962)

Leland Murray Lucas v. Stewart L. Udall, et al., Civil No. 5007 Phx., D. Ariz. Stipulated dismissal, October 10, 1967.

Estate of Richard Lucero, IA-1435 (June 13, 1966)

Eunice Lucero Vaile v. Stewart L. Udall, Civil No. 6808, W.D. Wash. Judgment for defendant, May 12, 1967; summary judgment entered May 25, 1967; no appeal.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey, et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Suit pending.

Sheridan L. McCarry, A-28759 (January 26, 1962)

Sheridan L. McCarry v. Stewart L. Udall, Civil No. 1262-62. Judgment for defendant, 216 F. Supp. 314 (1962); aff'd., 317 F. 2d 595 (1963); no petition.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall, Civil No. 2001-67. Judgment for defendant, February 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

Estate of Alvina Beauvois McLean, IA-D-27 (February 14, 1969), IA-D-30 (July 24, 1969)

Kenneth Samuel McLean v. Walter J. Hickel, Secretary of the Interior, Civil No. 2721-69, D. C. Judgment for defendant, March 13, 1970; appeal docketed April 13, 1970.

Wade McNeil, et al., 64 I.D. 423 (1957)

Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard, et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil No. 678-62. Judgment for defendant, December 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); cert. denied, 381 U.S. 904 (1965).

Wade McNeil, A-30736 (April 20, 1967)

Wade McNeil v. Udall, Civil No. 2705, D. Mont. Judgment for defendant, February 6, 1969 (opinion); no appeal.

Billy Mathis, et al., A-30512 (July 6, 1966)

Billy Mathis, et al. v. Stewart L. Udall, et al., Civil No. 6833, D. N.M. Dismissed with prejudice, January 6, 1967; rendered moot by P.L. 89-365.

Ralph E. May, A-29014 (January 30, 1962)

Ralph E. May v. Stewart L. Udall, Civil No. 1379-62. Dismissed with prejudice, March 22, 1963; no appeal.

Estate of Oliver Maynahonah, IA-1522 (No dec.), IA-T-1 (June 30, 1966)

Ruth Maynahonah Kadayso v. Stewart L. Udall, Civil No. 66-281, W.D. Okla. Dismissed with prejudice, February 8, 1967.

Allan E. Mecham, et al., A-30244 (December 23, 1964)

Allan E. Mecham, et al. v. Stewart L. Udall, et al., Civil No. C-22-65, D. Utah. Motion to dismiss granted, May 11, 1965; aff'd., 369 F. 2d 1 (10th Cir. 1966); no petition.

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. U.S., Ct. Cl. No. 492-69. Suit pending.

Donald E. Miller, IBLA-70-92 (appeal pending)

Donald E. Miller v. Walter J. Hickel, et al., Civil No. C-70-2328, D. Cal. Suit pending.

Duncan Miller, A-27620 (July 28, 1958)

Duncan Miller v. Fred A. Seaton, Civil No. 346-60. Judgment for defendant, February 23, 1961; aff'd., 307 F. 2d 676 (1962); cert. denied, 371 U.S. 967 (1963); rehearing denied, 372 U.S. 950 (1963).

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia and Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, A-28008 (August 10, 1959), A-28093 et al. (October 30, 1959), A-28133 (December 22, 1959), A-28378 (August 5, 1960), A-28258 et al. (February 10, 1960).

Duncan Miller v. Stewart L. Udall, Civil No. 3470-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Duncan Miller, A-28057 (October 16, 1959), A-28398 (August 31, 1960), A-28359 (July 18, 1960), A-28433 (August 30, 1960), A-28293, A-28436 (June 7, 1960), A-27897, A-27914, A-27923, A-27930, A-28003, A-28014 (March 31, 1959), A-27810 (January 16, 1959).

Duncan Miller v. Stewart L. Udall, Civil No. 3931-60. Judgment for defendant, April 4, 1963; aff'd., per curiam dec., February 7, 1964; no petition.

Duncan Miller v. Stewart L. Udall, Civil No. 1642-64. Dismissed with prejudice, August 13, 1964; aff'd., January 12, 1965; no petition.

Duncan Miller, A-28528 et al. (February 10, 1960)

Betty J. Lewis v. Stewart L. Udall, Civil No. 3904-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Duncan Miller, A-28509 (October 20, 1960)

Duncan Miller v. Stewart L. Udall, Civil No. 187-61. Judgment for defendant, May 24, 1963; no appeal.

Duncan Miller, A-28172 (February 11, 1960), A-28267 (June 8, 1960)

Duncan Miller v. Stewart L. Udall, Civil No. 3932-60. Judgment for defendant, May 22, 1963; aff'd., February 7, 1964; no petition.

Duncan Miller v. Stewart L. Udall, Civil No. 1642-64. Dismissed with prejudice, August 13, 1964; aff'd., January 12, 1965; no petition.

Duncan Miller, A-28586, A-28633, A-28671, A-28686 (January 25, 1961)

Duncan Miller v. Stewart L. Udall, Civil No. 1268-61. Judgment for defendant, September 28, 1962: appeal dismissed (1963).

Duncan Miller, A-28647 (July 20, 1961)

Duncan Miller v. Stewart L. Udall, Civil No. 3409-61. Judgment for defendant, May 21, 1963; no appeal.

Duncan Miller, A-29312 (January 29, 1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1381-62. Judgment for defendant, November 21, 1962 (opinion); appeal dismissed April 12, 1963.

Duncan Miller, A-28937 (September 25, 1962), A-29041 (November 7, 1962)

Duncan Miller v. Stewart L. Udall, Civil No. 4003-62. Dismissed for want of prosecution, May, 1966.

Duncan Miller, A-29365 (July 1, 1963), A-29521 (August 29, 1963), and A-29633 (September 5, 1963).

Duncan Miller v. Stewart L. Udall, Civil No. 2413-63. Dismissed, October 2, 1967; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. Stewart L. Udall, Civil No. 931-63. Dismissed for lack of prosecution, April 21, 1966; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A-29900 (March 5, 1964), A-30067 (March 12, 1964)

Duncan Miller v. Stewart L. Udall, Civil No. 689-64. Dismissed for failure to prosecute, July 6, 1966.

Duncan Miller, A-30213 (April 8, 1964), A-30192 (April 9, 1964), A-30212 (July 13, 1964)

Duncan Miller v. Stewart L. Udall, Civil No. 1829-64. Judgment for defendant, September 28, 1965; no appeal.

Duncan Miller, A-30122 (September 23, 1964), A-30451 (November 17, 1965)

Duncan Miller v. Stewart L. Udall, Civil No. 2543-64. Motion to amend granted, February 15, 1966; dismissed, April 3, 1969; no appeal.

Duncan Miller, A-30270 (May 5, 1965)

Duncan Miller v. Stewart L. Udall, Civil No. C-153-65, D. Utah. Judgment for defendant, November 15, 1965; aff'd., 368 F. 2d 548 (10th Cir. 1966); no petition.

Duncan Miller, A-30434 (June 8, 1965)

Duncan Miller v. Stewart L. Udall, Civil No. 9477, N.D. Cal. Judgment for defendant, June 27, 1966; no appeal.

Duncan Miller, A-30393 (June 30, 1965)

Duncan Miller v. Stewart L. Udall, Civil No. 2384-65. Judgment for defendant, October 12, 1966; dismissed May 22, 1967; supp. complaint dismissed June 12, 1967; appeal dismissed April 12, 1968; petition for mandamus denied, October 14, 1968.

Duncan Miller, A-30517 (April 28, 1966)

Duncan Miller v. Stewart L. Udall, Civil No. 5047, D. Wyo. Judgment for defendant, August 11, 1966; appeal dismissed, September 14, 1967.

Duncan Miller, A-30570 (August 3, 1966)

Duncan Miller v. Stewart L. Udall, Civil No. A-139-66, D. Alas. Judgment for defendant, March 13, 1967; motion for reconsideration denied, September 19, 1967; no appeal.

Duncan Miller, A-30546 (August 10, 1966), A-30566 (August 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. Udall, Civil No. C-167-66, D. Utah. Dismissed with prejudice, April 17, 1967; no appeal.

Duncan Miller, A-29231 (February 5, 1963)
See Lucille S. West, Duncan Miller, et al.

Duncan Miller, A-30669 (November 8, 1966)

Duncan Miller v. Director of the Bureau of Land Management, Civil No. 779, D. Mont. Judgment for defendant, April 25, 1969; no appeal.

Duncan Miller, A-30628 (November 16, 1966), A-30684 (January 19, 1967), A-30708 (November 16, 1966), A-30797 (September 12, 1967)

Duncan Miller v. Secretary of the Interior and his officers, Civil No. 7334, D. N.M. Dismissed with prejudice, August 28, 1968.

Duncan Miller, A-30891 (March 5, 1968)

Duncan Miller v. Udall, Civil No. 745-68. Dismissed with prejudice, October 14, 1968; no appeal.

Duncan Miller, A-30924 (November 13, 1968), A-30934 (November 22, 1968), A-30966 (October 29, 1968), A-31054 (August 21, 1969)

Duncan Miller v. Secretary of the Interior, Civil No. 52-69. Dismissed without prejudice, July 20, 1970.

Duncan Miller, A-31087 (February 4, 1970), A-31095 (February 2, 1970), A-31148 (March 2, 1970), A-31159 (March 2, 1970)

Duncan Miller v. Officers of the BLM & Dept. of the Interior, Civil No. 1393-70. Suit pending.

H. D. Mollohan & Eagle Tail Ranch, A-29335 (July 8, 1963)

H. D. Mollohan, et al. v. Warren J. Gray, et al., Civil No. 4877 Phx., D. Ariz. Judgment for defendant, November 13, 1967; aff'd., 413 F. 2d 349 (9th Cir. 1969); no petition.

Howard S. Mollring, A-29498 (July 26, 1963)

Howard S. Mollring v. J. E. Keough, et al., Civil No. C-200-63, D. Utah. Judgment for defendant, January 8, 1964; no appeal.

Bobby Lee Moore, et al., 72 I.D. 505 (1965) Anquita L. Kluenter, et al., A-30483 (November 18, 1965)

Gary Carson Lewis, etc., et al. v. General Services Administration, et al., Civil No. 3253 S.D. Cal. Judgment for defendant, April 12, 1965; aff'd., 377 F. 2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan, et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, February 20, 1961 (opinion); aff'd., 306 F. 2d 799 (1962); cert. denied, 371 U.S. 941 (1962).

Morrison-Knudsen Co., 64 I.D. 185 (1957)

Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r., 345 F. 2d 833 (1965); Commr's. report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

New York State Natural Gas Corp., A-28687 (July 19, 1962)

Jacob N. Wasserman v. Stewart L. Udall, Civil No. 3207-62. Judgment for defendant, 234 F. Supp. 651 (1964); no appeal.

Jess H. Nicholas, Jr., A-30065 (October 13, 1964)

Jess H. Nicholas, Jr. v. Stewart L. Udall, Civil No. A-67-64, D. Alas. Judgment for defendant, September 17, 1965; aff'd., 385 F. 2d 177 (9th Cir. 1967); no petition.

Leonard E. Noren, A-27583 (September 13, 1960)

Leonard E. Noren v. Walter E. Beck, Civil No. 2139 ND, S.D. Cal. Judgment for defendant, 199 F. Supp. 708 (1961).

Leonard E. Noren v. Walter E. Beck, Civil No. 2347 ND, S.D. Cal. Judgment for plaintiff, September 17, 1965; rev'd. & remanded sub nom. Robert E. McCarthy, successor to Walter E. Beck v. Leonard E. Noren, et al., rev'd. & remanded, 370 F. 2d 845 (9th Cir. 1966); cert. denied, 387 U.S. 917 (1967).

Appeal of North Star Aviation Corp., IBCA-741 (May 19, 1969)

North Star Aviation Corp. v. U.S., Ct. Cl. No. 264-69. Suit pending.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); cert. denied, 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alas. Withdrawn April 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alas. Dismissed, April 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alas. Dismissed, October 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, October 29, 1963 (oral opinion); aff'd., 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alas. Dismissed without prejudice, March 2, 1964; no appeal.

Joseph I. O'Neill, Jr., A-30488 (April 19, 1966)

Joseph I. O'Neill, Jr. v. Stewart L. Udall, Civil No. 3556-SD-K, S.D. Cal. Order denying defendant's motion for summary judgment, without prejudice & remanding case for clarification of Departmental decision, March 8, 1967; no appeal.

Eugene C. Paine, et al., A-27632 (August 21, 1958)

Eugene C. Paine, et al. v. Stewart L. Udall, Civil No. 2607-58. Judgment for plaintiff, September 24, 1959; vacated & remanded, Wright v. Seaton, Misc. 1403, January 11, 1960. Judgment for plaintiff, May 4, 1960; rev'd. & remanded, February 23, 1961; judgment for defendant, March 20, 1961; no petition.

Irene Mitchell Pallin, A-28766 (September 21, 1962)

Irene Mitchell Pallin v. U.S., Civil No. 47552, N.D. Cal. Judgment for plaintiff, December 16, 1970.

Pan American Petroleum Corp., IA-840 (December 18, 1959)

Pan American Petroleum Corp. v. Stewart L. Udall, Civil No. 960-60. Judgment for plaintiff, 192 F. Supp. 626 (1961); subsequent administrative appeal & supplemental complaint filed; judgment for plaintiff, February 16, 1966; no appeal.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, December 19, 1958.

Perry & Wallis, Inc., IBCA-617 (July 16, 1968)

Perry & Wallis, Inc. v. U.S., Ct. Cl. 365-68. Judgment for defendant, 427 F. 2d 722 (1970).

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Estate of Pete-Goh-Deh-Dil (Joe Pete), IA-1322 (June 7, 1966)

Don & Winona James v. Mabel George Gomez, et al., Civil No. S-66-104, E.D. Cal. Dismissed with prejudice as to defendants Udall, Crow & Hall, May 22, 1969; dismissed with prejudice as to defendant Gomez, September 1, 1970.

M. Blaine Peterson, A-28111 (November 23, 1959)

L. Robert Anderson v. Stewart L. Udall, Civil No. 3953-60. Dismissed without prejudice, November 13, 1961; no appeal.

Petroleum Ownership Map Co., IBCA-110 (May 29, 1958)

Petroleum Ownership Map Co. v. U.S., Ct. Cl. 269-62. Judgment for plaintiffs, 389 F. 2d 793 (1968).

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, August 2, 1962; aff'd., 317 F. 2d 573 (1963); no petition.

Platte Valley Construction Co., IBCA-168 (August 28, 1958)

George Stanek, et al. v. U.S., Ct. Cl. 189-62. Compromised.

John M. Pomeroy, A-28134 (January 13, 1960)

John M. Pomeroy v. Walter E. Beck, Civil No. 8033, N.D. Cal. Dismissed by plaintiff, August 15, 1961; no appeal.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W.D. Wash. Dismissed with prejudice, December 7, 1964.

Preston Nutter Corp., IBLA-70-144 (appeal pending)

Preston Nutter Corp. v. Walter J. Hickel, Civil No. 294-70, D. Utah. Suit pending.

Property Management Co., A-29144 (August 19, 1963)

Property Management Co. v. Stewart L. Udall, Civil No. 64-28, D. Ore. Judgment for defendant, 255 F. Supp. 382 (1966); appeal dismissed, October 13, 1966. See Linn Land Co. v. Udall.

R. E. Puckett, A-30419 (October 29, 1965)

Robert E. Puckett v. Stewart L. Udall, Secretary of the Interior, Civil No. 2786-65. Dismissed without prejudice, August 15, 1966.

Ethel C. Radzewicz, et al., A-30866 (January 29, 1968)

Georgette B. Lee (Hall) v. Udall, Civil No. 985-68. Judgment for defendant, October 30, 1969; dismissed, November 17, 1970.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. U.S., Ct. Cl. 51-66. Judgment for plaintiff, December 13, 1968; subsequent Contract Officer's dec., December 3, 1969; interim dec., December 2, 1969; Order to Stay Proceedings until March 31, 1970; dismissed with prejudice, August 3, 1970.

Estate of Elgin Red Elk, IA-1230 (November 13, 1964)

Bert Taunah, et al. v. Stewart Udall, Civil No. 65-82, W.D. Okla. Judgment for plaintiff, April 27, 1967; rev'd. & remanded, 398 F. 2d 795 (10th Cir. 1968); no petition.

R. G. Brown, Jr. & Co., IBCA-356 (July 26, 1963)

Robert G. Brown, Jr., et al. v. U.S., Ct. Cl. No. 373-63. Judgment for plaintiff, April 6, 1965; no appeal.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, March 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965)

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Suit pending.

Evelyn R. Robertson, et al., Duncan Miller, A-29251 (March 21, 1963)

Duncan Miller v. Stewart L. Udall, Civil No. 1066-63. Judgment for defendant, March 13, 1964; aff'd., 349 F. 2d 193 (1965); cert. denied, 385 U.S. 929 (1966); rehearing denied, 385 U.S. 1021 (1966).

W. C. Wells v. Stewart L. Udall, Civil No. A-37-63, D. Alas. Dismissed with prejudice, September 7, 1965; no appeal.

Evelyn R. Robertson v. Stewart L. Udall, Civil No. 1561-63. Judgment for defendant, April 4, 1964; aff'd. 349 F. 2d 195 (1965); no petition.

Edgar Rundle, A-29593 (August 2, 1963)

Edgar Rundle v. Stewart L. Udall, Civil No. 191-65. Judgment for defendant, September 22, 1965; aff'd., 379 F. 2d 112 (1967); cert. denied, 389 U.S. 845 (1967).

Estate of James Running Horse, IA-1048 (May 26, 1960)

Mary Hit Him Running Horse v. Stewart L. Udall, Civil No. 2106-68. Judgment for plaintiff, 211 F. Supp. 586 (1962); no appeal.

Louise Safarik, A-28307 et al. (April 22, 1960)

John J. King v. Stewart L. Udall, Civil No. 3903-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Louise Safarik, et al., A-28562 et al. (January 26, 1961)

Louise Safarik v. Stewart L. Udall, Civil No. 1081-61. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

Samuel Gary v. Stewart L. Udall, Civil No. 1202-61. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. S. Jack Hinton, et al. v. Stewart L. Udall, 364 F. 2d 676 (1966); cert. denied, 385 U.S. 878 (1966); supplemented by M-36767, November 1, 1967.

B. F. Sandoval, Jr., A-29975 (June 12, 1964)

B. F. Sandoval, Jr. v. Stewart L. Udall, Civil No. 5779, D. N.M. Judgment for plaintiff, May 11, 1965; appeal dismissed January 12, 1966; order vacating prior judgment issued January 28, 1966.

Santa Fe Sand & Gravel Co., A-30657 (April 25, 1967)

Santa Fe Sand & Gravel Co. v. Boyd L. Rasmussen, et al., Civil No. 7135, D. N.M. Summary judgment for defendant, May 28, 1968; no appeal.

Casper Joseph Schmand, Attorney in fact for Mike Swab, A-29451 (August 19, 1963)

Casper Joseph Schmand v. Stewart L. Udall, Civil No. 63-484, D. Ore. Judgment for defendant, 255 F. Supp. 382 (1966); appeal dismissed, October 13, 1966. See Linn Land Co. v. Udall.

Ann D. Schmidt, A-28349 (July 28, 1960)

Ann D. Schmidt v. Stewart L. Udall, Civil No. 3912-60. Judgment for defendant, April 11, 1961; no appeal.

Betty Mae Schober & John L. Richardson, A-29430 (January 8, 1964). Reconsideration denied, March 6, 1964.

John L. Richardson v. Stewart L. Udall, Civil No. 3975, D. Idaho. Remanded, 253 F. Supp. 72 (1966); no appeal.

Charles Schraier, Robert Schulein, et al., A-30814, A-30816 (November 21, 1967)

Charles Schraier v. Stewart L. Udall, Secretary of the Interior, Civil No. 427-68. Judgment for defendant, October 31, 1968; aff'd., 419 F. 2d 663 (1969); petition for rehearing en banc denied, October 8, 1969; no petition.

Joseph M. Schuck, A-28603 (August 16, 1961)

Joseph M. Schuck v. Secretary of the Interior, No. 16,682. Petition for review dismissed, December 15, 1961; no appeal.

Joseph M. Schuck v. Secretary of the Interior, Civil No. 1402 Tuc., D. Ariz. Complaint dismissed, January 30, 1962; no appeal.

Joseph M. Schuck v. Roy T. Helmandollar, Civil No. 1402 Tuc., D. Ariz. Judgment for defendant, March 19, 1962; no appeal.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. U.S., Ct. Cl. 274-62. Judgment for plaintiff, January 31, 1964; no appeal.

John W. Shaw, A-29143 (April 5, 1963)

John W. Shaw v. Stewart L. Udall, Secretary of the Interior, Civil No. 63-602, D. Ore. Aff'd., 264 F. Supp. 390 (1967); appeal docketed March 13, 1967; appeal dismissed.

Shell Oil Co., A-30575 (October 31, 1966), Chargeability of Acreage Embraced in Oil & Gas Lease Offers, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal, August 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. Stewart L. Udall, Secretary of the Interior, et al., Civil No. 5277, D. Wyo. Judgment for defendant, sub nom. Atlantic Richfield Co. v. Walter J. Hickel, 303 F. Supp. 724 (1969); aff'd., 432 F. 2d 587 (10th Cir. 1970); no petition.

Eldon L. Smith, A-30944 (October 15, 1968)

D. L. Hannifin v. Walter J. Hickel, et al., Civil No. 8074, D. N.M. Judgment for defendant, January 6, 1970; remanded, May 25, 1970; judgment for defendant, May 28, 1970; appeal docketed, July 20, 1970.

Eldon L. Smith, A-30944 (October 15, 1968)

Eldon L. Smith v. Walter J. Hickel, Civil No. 69-245, D. Ariz. Judgment for defendant, February 3, 1970.

L. B. Smith, et al., A-30447 (October 29, 1965)

Charles J. Babington v. Stewart L. Udall, Civil No. 3048-65. Dismissed without prejudice for failure of prosecution, May 1, 1967; no appeal.

Stanley C. Soho, A-28135 (August 19, 1959), A-28135 Supp. (July 17, 1961), Supplemented by decision dated February 1, 1963, by Director, Bureau of Land Management, approved by the Secretary March 18, 1963.

Robert V. Ferry & Irving Baker v. Stewart L. Udall, Civil No. 1648 Tuc., D. Ariz. Judgment for defendant, September 3, 1963; aff'd., 336 F. 2d 706 (9th Cir. 1964); cert. denied 381 U.S. 904 (1965).

Stanley C. Soho, et al., A-28175 (April 11, 1960)

Albert Meeks v. E. I. Rowland, Civil No. 3461-Phx., D. Ariz. Case dismissed, January 17, 1961; no appeal.

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, December 2, 1970.

Southport Land & Commercial Co., Sacramento 075330 (January 15, 1964)

Southport Land & Commercial Co. v. Stewart Udall, et al., Civil No. 42385, N.D. Cal. Dismissed as to defendant Stewart Udall, 244 F. Supp. 172 (1965); aff'd., 371 F. 2d 526 (9th Cir. 1967); no petition.

Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, January 14, 1970; appeal dismissed, April 6, 1970.

Southwestern Petroleum Corp., et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D. N.M. Judgment for defendant, March 8, 1965; aff'd., 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel, et al., Civil No. A-159-69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); appeal docketed November 19, 1970.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D. N.M. Judgment for plaintiff, January 21, 1965; no appeal.

Ross Stegman, A-30812 (November 21, 1967)

Ross Stegman v. Stewart L. Udall, Civil No. 6953 Phx., D. Ariz. Remanded to Hearing Examiner for taking of further evidence, December 12, 1969.

Florence Emily Tagala v. Amanda Nellie Ruth Price, A-30715 (November 10, 1966)

Amanda Price v. Udall, Civil No. 33-67, D. Alas. Judgment for plaintiff, 280 F. Supp. 393 (1968); remanded to Bureau of Land Management, 411 F. 2d 589 (9th Cir. 1969); no petition.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman, et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, November 1, 1962 (opinion); rev'd., 324 F. 2d 411 (1963); cert. granted, 376 U.S. 961 (1964); Dist. Ct. aff'd., 380 U.S. 1 (1965); rehearing denied, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); remanded, August 19, 1970.

Texas Construction Co., 64 I.D. 97 (1957)
Reconsideration denied, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, December 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil No. 859-581. Judgment for defendant, September 18, 1958; aff'd., 270 F. 2d 319 (1959); cert. denied, 364 U.S. 814 (1960); rehearing denied, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D. N.M. Dismissed with prejudice June 25, 1963.

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, et al., Civil No. 2406-61. Judgment for defendant, March 22, 1962; aff'd., 314 F. 2d 257 (1963); cert. denied, 373 U.S. 951 (1963).

Richard K. Todd, et al., 68 I.D. 291 (1961)

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd., 350 F. 2d 748 (1965); cert. denied, 383 U.S. 912 (1966).

Atwood, et al. v. Stewart L. Udall, Civil Nos. 293-62 - 299-62, incl. Judgment for defendant, August 2, 1962; aff'd., 350 F. 2d 748 (1965); no petition.

E. B. Todhunter, A-28197 (May 23, 1960)

Victoria L. Cuccia v. Stewart L. Udall, Civil No. 3921-60. Judgment for defendant, September 17, 1963; no appeal.

Tree Land Nursery, Inc., IBCA-436 (October 31, 1966)

Tree Land Nursery, Inc. v. U.S., Ct. Cl. 238-67. Judgment for plaintiff, May 13, 1969.

Tyee Construction Co., IBCA-112 and 113 (April 30, 1958)

Tyee Construction Co. v. U.S., Ct. Cl. No. 312-60. Judgment for defendant, June 1, 1962; no appeal.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co., et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd., 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd., 289 F. 2d 790 (1961); no petition.

Union Oil Company of California, et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown, et al. v. Stewart Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, December 8, 1970.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Harlan H. Hugg, et al. v. Stewart L. Udall, Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Barnette T. Napier, et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, December 8, 1970.

John W. Savage v. Stewart L. Udall, Civil No. 9458, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

The Oil Shale Corp., et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, December 8, 1970.

The Oil Shale Corp., et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

Joseph B. Umpleby, et al. v. Stewart L. Udall, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, December 8, 1970.

Union Oil Co. of California, a Corp. v. Stewart L. Udall, Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 2595-64. Judgment for defendant, December 27, 1965; no appeal.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming and Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd., 379 F. 2d 635 (10th Cir. 1967); cert. denied, 389 U.S. 985 (1967).

U.S. v. Alonzo A. Adams, et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams, et al. v. Paul B. Witmer, et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); rev'd. & remanded, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, January 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. Arizona Exploration Co., et al., A-28876 (June 22, 1962)

Blaine J. Lord, et al. v. Roy T. Helmandollar, et al., Civil No. 987-63. Judgment for defendants, September 30, 1963; appeal dismissed, 348 F. 2d 780 (1965); cert. denied, 383 U.S. 928 (1966); rehearing denied, 384 U.S. 947 (1966).

6091

U.S. v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an individual and as Executrix of the Last Will of E. A. Barrows, deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, April 20, 1970; appeal docketed May 6, 1970.

U.S. v. R. B. Borders, A-28624 (October 23, 1961)

J. R. Osborne v. Harold C. Hammitt, Civil No. 414, D. Nev. Judgment for defendant, August 19, 1964 (opinion); no appeal.

U.S. v. Calhoun & Howell of Oregon, Ltd., U.S. v. Lee Temple, A-31004 (August 29, 1969)

Calhoun & Howell of Oregon, Ltd. v. Walter J. Hickel, Civil No. 70-155, D. Ore. Judgment for defendant, September 24, 1970; no appeal.

U.S. v. John C. Chapman, et al., A-30581 (July 16, 1968)

John C. Chapman, et al. v. U.S., Civil No. 69-12 Pct., D. Ariz. Suit pending.

U.S. v. Nick Chournos, A-28577 (July 14, 1961)

Nick Chournos v. U.S., Civil No. C-164-61, D. Utah. Complaint dismissed, January 9, 1962; no appeal.

Nick Chournos, et al. v. U.S., et al., Civil No. C-238-62, D. Utah. Dismissed, June 28, 1963; aff'd., 335 F. 2d 918 (10th Cir. 1964); no petition.

U.S. v. Willard Christensen, A-27549 (May 14, 1958)

La Fortuna Uranium Mines, Inc. v. Fred A. Seaton, Civil No. 191-59. Judgment for defendant, April 4, 1960; no appeal.

U.S. v. J. R. Clements, A-27751 (December 15, 1958)

John Raymond Clements v. Fred A. Seaton, Civil No. 560-59. Judgment for defendant, January 13, 1960; no appeal.

U.S. v. Alfred Coleman, A-28557 (March 27, 1962)

U.S. v. Alfred Coleman, Civil No. 63-956-WB, S.D. Cal. Judgment for defendant, February 25, 1965 (opinion); remanded, 363 F. 2d 190 (9th Cir. 1966); aff'd., 379 F. 2d 555 (9th Cir. 1967); cert. granted, 389 U.S. 970 (1967); rev'd. and remanded to 9th Circuit, 390 U.S. 599 (1968); rehearing denied, 391 U.S. 961 (1968); aff'd., 405 F. 2d 72 (9th Cir. 1968); cert. denied, 394 U.S. 907 (1969).

U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); aff'd., 399 F. 2d 616 (9th Cir. 1968); cert. denied, 393 U.S. 1025 (1969).

U.S. v. Jesse W. Crawford, A-30820 (January 29, 1968)

Jesse W. Crawford v. Stewart L. Udall, Civil No. 6969 Phx., D. Ariz. Judgment for defendant, May 20, 1969; appeal docketed July 18, 1969.

U.S. v. Alvis F. Denison, et al., 71 I.D. 144 (1964), 76 I.D. 233 (1969)

Marie W. Denison, individually & as executrix of the Estate of Alvis F. Dension, deceased v. Stewart L. Udall, Civil No. 963, D. Ariz. Remanded, 248 F. Supp. 942 (1965).

Leo E. Shoup v. Stewart L. Udall, Civil No. 5822-Phx., D. Ariz. Suit pending.

Reid Smith v. Stewart L. Udall, etc., Civil No. 1053, D. Ariz. Suit pending.

U.S. v. J. S. Devenny, A-30289 (August 6, 1964)

J. S. Devenny v. Stewart L. Udall, Civil No. 6283, W.D. Wash. Dismissed, June 22, 1966; no appeal.

U.S. v. Francis Dlouhy, et al., A-27668 (September 24, 1958)

Francis N. Dlouhy v. Fred A. Seaton, Civil No. 405-59. Judgment for defendant, May 3, 1960; appeal dismissed, November 28, 1960.

U.S. v. The Dredge Corp., A-28022 (December 18, 1959)

The Dredge Corp. v. J. Russell Penny, Civil No. 396, D. Nev. Judgment for defendant, September 25, 1962; remanded, 338 F. 2d 456 (9th Cir. 1964); judgment for plaintiff, August 8, 1966; judgment for defendants, 398 F. 2d 791 (9th Cir. 1968); cert. denied, 393 U.S. 1066 (1969).

U.S. v. Ralph Fairchild, A-30803 (January 19, 1968)

Minerals Trust Corp. v. Stewart L. Udall, Civil No. 6960 Phx., D. Ariz. Judgment for defendant, May 20, 1969; appeal docketed July 18, 1969.

U.S. v. Kathryn R. Fitzgerald, A-30973 (July 25, 1969)

Kathryn R. Fitzgerald & John Holden v. Walter J. Hickel, Civil No. 70-421-Phx., D. Ariz. Judgment for defendant, November 23, 1970.

U.S. v. Everett Foster, et al., 65 I.D. 1 (1958)

Everett Foster, et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, December 5, 1958 (opinion); aff'd., 271 F. 2d 836 (1959); no petition.

U.S. v. Fred Garula, A-29948 (June 3, 1964)

Fred Garula v. Stewart L. Udall, Civil No. 8998, D. Colo. Judgment for plaintiff, 268 F. Supp. 910 (1967); rev'd., 405 F. 2d 1181 (10th Cir. 1968); no petition.

U.S. v. Golden Eagle Mining Corp., A-30864 (September 25, 1967)

Golden Eagle Mining Corp. v. Stewart L. Udall, Secretary of the Interior, Civil No. S-937, E.D. Cal. Dismissed for lack of prosecution, October 6, 1969; no appeal.

U.S. v. Richard P. Haskins, A-30737 (December 19, 1966)

Richard P. Haskins for himself & as Admin. of the Estate of Bartholomew H. Haskins, Deceased v. Udall, Civil No. 67-1815-CC, C.D. Cal. Judgment for defendant, April 15, 1968; remanded to the Director, Bureau of Land Management for an exercise of discretion, October 3, 1969.

U.S. v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk, et al., Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); rev'd. & remanded for further proceedings, 419 F. 2d 766 (9th Cir. 1969); cert. denied, 398 U.S. 950 (1970).

U.S. v. Charles H. Henrikson, et al., 70 I.D. 212 (1963)

Charles H. Henrikson, et al. v. Stewart L. Udall, et al., Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); aff'd., 350 F. 2d 949 (9th Cir. 1965); cert. denied, 384 U.S. 940 (1966).

U.S. v. Taylor T. Hicks, et al., A-30780 (October 24, 1967)

Taylor T. Hicks, et al. v. U.S., Stewart L. Udall, Secretary of the Interior, Civil No. Civ.-1202 Pct., D. Ariz. Judgment for defendant, March 26, 1970.

U.S. v. Independent Quick Silver Co., 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. Inlet Oil Corp. & Raymond J. Ellis, A-31115 (March 17, 1970)

Inlet Oil Corp. & Raymond J. Ellis v. Walter Hickel, Civil No. A-48-70, D. Alas. Suit pending.

U.S. v. R. B. Johnson, A-30405 (October 28, 1965)

R. B. Johnson v. Stewart L. Udall, Civil No. 1071, D. Ariz. Judgment for defendant, November 21, 1967; no appeal.

U.S. v. Robert N. Johnson, et al., A-30828 (January 29, 1968)

Robert N. Johnson, et al. & Thelma A. Johnson as individ. & as Executrix of Nolan F. Fultz estate v. Stewart L. Udall, Civil No. 68-994-AAH, C.D. Cal. Judgment for plaintiff, 292 F. Supp. 738 (1968); no appeal.

U.S. v. Horace J. & Elsie Marie Knowlton, A-30912 (May 21, 1968)

Elsie Marie & Horace J. Knowlton v. Walter J. Hickel, Secretary of the Interior, Civil No. C-191-69, D. Utah. Suit pending.

U.S. v. Richard Dean Lance, 73 I.D. 218 (1966)

Richard Dean Lance v. Stewart L. Udall, et al., Civil No. 1864, D. Nev. Judgment for defendant, January 23, 1968; no appeal.

U.S. v. Lane Minerals, Inc., A-30497 (March 28, 1966)

Lane Minerals, Inc. v. Stewart L. Udall & the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Civil No. 67-535, D. Ore. Judgment for defendant, February 2, 1970.

U.S. v. Robert L. Lawler, A-31134 (March 17, 1970)

Robert Lawler, et al. v. Walter Hickel, Civil No. F-14-70, D. Alas. Suit pending.

U.S. v. Mary A. Mattey, 67 I.D. 63 (1960)

U.S. v. Edison R. Nogueira, et al., Civil No. 65-220-PH, C.D. Cal. Judgment for defendant, November 16, 1966; rev'd. & remanded, 403 F. 2d 816 (1968); no petition.

U.S. v. Alvin M. May, A-30675 (July 25, 1968)

Alvin M. May v. Stewart Udall, et al., Civil No. R-2107, D. Nev. Judgment for plaintiff, December 15, 1969.

U.S. v. Kenneth McClarty, 71 I.D. 331 (1964), 76 I.D. 193 (1969)

Kenneth McClarty v. Stewart L. Udall, et al., Civil No. 2116, E.D. Wash. Judgment for defendant, May 26, 1966; rev'd. & remanded, 408 F. 2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; vacated & remanded to Bureau of Land Management, August 13, 1969.

U.S. v. Frank & Wanita Melluzzo, et al., 76 I.D. 181 (1969), Reconsideration, 77 I.D. 172 (1970)

WJM Mining & Development Co., et al. v. Walter Hickel, Civil No. 70-679, D. Ariz. Suit pending.

U.S. v. Ernest Evon Moseley, A-30971 (December 13, 1967)

Ernest E. Moseley v. Udall, Civil No. 6939 Phx., D. Ariz. Judgment for defendant, May 20, 1969; appeal docketed July 18, 1969.

U.S. v. G. C. (Tom) Mulkern, A-27746 (January 19, 1959)

G. C. (Tom) Mulkern v. James Keough, Civil No. 299, D. Nev. Judgment for defendant, February 19, 1963 (opinion); aff'd., 326 F. 2d 896 (9th Cir. 1964); no petition.

U.S. v. Melvin L. Nevitt, A-30030 (July 28, 1964)

U.S. v. Melvin L. Nevitt, Civil No. 3423-SD-C, S.D. Cal. Judgment for plaintiff, November 28, 1966; no appeal.

U.S. v. New Jersey Zinc Company, 74 I.D. 191 (1967)

The New Jersey Zinc Corp., a Del. Corp. v. Stewart L. Udall, Civil No. 67-C-404, D. Colo. Dismissed with prejudice, January 5, 1970.

U.S. v. Wilma L. Oldaker, A-30378 (August 26, 1965)

Wilma Oldaker v. Stewart L. Udall, Civil No. A-98-65, D. Alas. Stipulated dismissal with prejudice, March 3, 1967; no appeal.

U.S. v. Richard C. Porter, et al., A-29882 (April 24, 1964)

Hal W. Eldridge, et al. v. Secretary of the Interior, Civil No. 64-353, D. Ore. Judgment for defendant, December 15, 1965 (opinion); no appeal.

U.S. v. E. V. Pressentin, et al., A-27495 (April 2, 1958)

E. V. Pressentin v. Fred A. Seaton, Civil No. 4804, W.D. Wash. Voluntary dismissal by plaintiff entered July 24, 1959.

E. V. Pressentin, et al. v. Fred A. Seaton, Civil No. 1907-59. Judgment for defendant, January 15, 1960; rev'd. & remanded, 284 F. 2d 195 (1960); see A-30004, 71 I.D. 447 (1964).

U.S. v. E. V. Pressentin and Devisees of the H. S. Martin Estate, 71 I.D. 447 (1964)

E. V. Pressentin, Fred J. Martin, Admin. of H. A. Martin Estate v. Stewart L. Udall & Charles Stoddard, Civil No. 1194-65. Judgment for defendant, March 19, 1969; no appeal.

U.S. v. C. F. Pruess, Sr., A-28641 (August 22, 1961)

C. F. Pruess, Sr. v. Stewart L. Udall, Civil No. 1331-62. Judgment for defendant, May 12, 1964; remanded, 359 F. 2d 615 (1965); judgment for defendant, January 4, 1966; per curiam dec., remanded for transfer to Dist. Ct. for Oregon. Not reported.

C. F. Pruess, Sr. v. Stewart L. Udall, Civil No. 67-167, D. Ore. Judgment for defendant, 286 F. Supp. 138 (1968); aff'd., 410 F. 2d 750 (9th Cir. 1969); cert. denied, 396 U.S. 967 (1969); rehearing denied, 397 U.S. 1003 1970.

U.S. v. Cecil R. Reed, A-30354 (September 29, 1965)

Cecil R. Reed v. Stewart L. Udall, et al., Civil No. 1784, D. Nev. Judgment for defendant, December 19, 1967; aff'd., 416 F. 2d 377 (9th Cir. 1969); cert. denied, 397 U.S. 924 (1970).

U.S. v. George A. and Dorothy Relyea, A-30909 (June 25, 1968)

George A. Relyea & Dorothy Relyea v. Stewart Udall, Secretary of the Interior, Civil No. 3-68-20, D. Idaho. Judgment for defendant, February 19, 1970; no appeal.

U.S. v. Edwin R. Saurers, et al., A-30097 (July 9, 1964)

Edwin R. Saurers, et al. v. Stewart L. Udall, Civil No. 6245, W.D. Wash. Judgment for defendant, July 19, 1965; no appeal.

U.S. v. Charles L. Seeley, et al., A-28127 (January 28, 1960)

Charles L. Seeley, et al. v. Secretary of the Interior, Civil No. 3693-60 & No. 41094, N.D. Cal. Judgment for defendant, July 29, 1964; appeal dismissed, December 16, 1964.

U.S. v. Ollie Mae Shearman et al., 73 I.D. 386 (1966)

U.S. v. Hood Corp., et al., Civil No. 1-67-97, S.D. Idaho. Suit pending.

U.S. v. Thomas R. Shuck, A-27965 (February 2, 1960)

Thomas R. Shuck v. Roy T. Helmandollar, Civil No. 682 Pct., D. Ariz. Judgment for defendant, December 7, 1961; no appeal.

U.S. v. U.S. Silica Corp., et al., A-30400 (August 24, 1965)

Simplot Industries, Inc. v. Udall, Civil No. 1024-S, D. Nev. Judgment for defendant, September 26, 1969; no appeal.

U.S. v. C. F. Snyder, et al., 72 I.D. 223 (1965)

Ruth Snyder, Adm'r[x] of the Estate of C. F. Snyder, Deceased, et al. v. Stewart L. Udall, Civil No. 66-C-131, D. Colo. Judgment for plaintiff, 267 F. Supp. 110 (1967); rev'd., 405 F. 2d 1179 (10th Cir. 1968); cert. denied, 396 U.S. 819 (1969).

U.S. v. Clarence T. & Mary D. Stevens, 77 I.D. 97 (1970)

Clarence T. & Mary D. Stevens v. Walter J. Hickel, Civil No. 1-70-94, D. Idaho. Suit pending.

U.S. v. Charles E. Stewart, A-28966 (September 25, 1962)

Charles E. Stewart v. Gordon Penny, et al., Civil No. 1619, D. Nev. Judgment for plaintiff, 238 F. Supp. 821 (1965); no appeal.

U.S. v. Alfred N. Verrue, 75 I.D. 300 (1968)

Alfred N. Verrue v. Secretary of the Interior, Civil No. 6898 Phx., D. Ariz. Remanded, December 29, 1970.

U.S. v. Kenneth O. Watkins & Harold E. L. Barton, A-29862 (April 24, 1966), A-30659 (October 19, 1967)

Harold E. L. Barton v. Stewart L. Udall, Secretary of the Interior & U.S., Civil No. 69-26, D. Ore. Suit pending.

U.S. v. Oscar W. Weiss, et al., A-30809 (September 14, 1967)

Oscar W. Weiss v. Stewart L. Udall, Civil No. C-882, D. Colo. Remanded, January 2, 1969.

U.S. v. Thomas C. Wells, A-30805 (January 8, 1968), A-30805 (Supp.) (April 25, 1969), A-30805 (Supp. II) (November 17, 1969)

Thomas C. Wells v. Udall, Civil No. S-693, E.D. Cal. Remanded to Secretary, December 12, 1968; remanded to Bureau of Land Management. Time extended to November 1, 1970 to comply with requirements of Supp. II. Judgment for defendant, December 17, 1970.

U.S. v. Vernon O. & Ina C. White, 72 I.D. 522 (1965)

Vernon O. White & Ina C. White v. Stewart L. Udall, Civil No. 1-65-122, D. Idaho. Judgment for defendant, January 6, 1967; aff'd., 404 F. 2d 334 (9th Cir. 1968); no petition.

U.S. v. Rodney Wood, et al., A-30697 (May 31, 1967)

Rodney Wood, et al. v. Stewart L. Udall, Secretary of the Interior, & Orville L. Freeman, Secretary of Agriculture, Civil No. S-436, N.D. Cal. Dismissed without prejudice, November 7, 1967; amended complaint filed; judgment for defendant, March 27, 1969; no appeal.

United Technical Industries, Inc., A-29406 (April 24, 1963)

Jay Nielson v. J. E. Keough, et al., Civil No. C-158-63, D. Utah. Dismissed July 13, 1964 (opinion); no appeal.

Paul Unruh v. Wesley Lawrence Edwards, A-30584 (September 21, 1966)

Paul E. Unruh v. Udall, et al., Civil No. 1894-N, D. Nev. Judgment for defendant, June 14, 1967; no appeal.

E. A. Vaughey, 63 I.D. 85 (1956)

E. A. Vaughey v. Fred A. Seaton, Civil No. 1744-56. Dismissed by stipulation, April 18, 1957; no appeal.

Burt A. Wackerli, et al., 73 I.D. 280 (1966)

Burt & Lueva G. Wackerli, et al. v. Stewart L. Udall, et al., Civil No. 1-66-92, D. Idaho. Suit pending.

Estate of Amelia Keyes Abbott Viramontes Walker, IA-1339 (April 5, 1966)

Earlene Ida Abbott Simons v. Udall, et al., Civil No. 2640, D. Mont. Judgment for defendant, 276 F. Supp. 75 (1967); no appeal.

Jack A. Walker, A-30492 (April 28, 1966)

Jack A. Walker v. U.S. & Udall, Civil No. 1-66-80, D. Idaho. Judgment for plaintiff, July 3, 1967; rev'd., 409 F. 2d 477 (9th Cir. 1969); no petition.

Wasatch Development Co., et al., A-28674 (May 16, 1963)

Joseph B. Umpleby, et al. v. Stewart L. Udall, Civil No. 8156, D. Colo. Judgment for defendant, 285 F. Supp. 25 (1968); no appeal.

Weardco Construction Corp., 64 I.D. 376 (1957)

Weardco Construction Corp. v. U.S., Civil No. 278-59-PH, S.D. Cal. Judgment for plaintiff, October 26, 1959; satisfaction of judgment entered February 9, 1960.

Lucille S. West, Duncan Miller, et al., A-29242 et al. (February 25, 1963), Duncan Miller, A-29231 (February 5, 1963)

Cecil H. Phillips, et al. v. Stewart L. Udall, Civil No. 847-63. Dismissed on behalf of all except Lucille S. West; judgment for defendant, February 25, 1964; no appeal.

Estate of Louise Wilson, IA-1380 (March 1, 1966)

Charles W. Heffelman v. Stewart L. Udall, Civil No. 6402, N.D. Okla. Dismissed June 16, 1966; aff'd., 378 F. 2d 109 (10th Cir. 1967); cert. denied, 389 U.S. 926 (1967).

Buck Willcoxson, A-27402, A-27403 (December 17, 1956)

Buck Willcoxson v. Douglas Henriques, Civil No. 3596, D. N.M. Motion of plaintiff to dismiss case without prejudice granted, December 10, 1957.

Buck Willcoxson v. Stewart L. Udall, Civil No. 2029-58.

U.S. v. Buck Willcoxson et al., Civil No. 1492-59.

Buck Willcoxson v. U.S., Civil No. 972-59.

Actions consolidated. Judgment for defendant, plaintiff, & defendant, respectively, August 3, 1961; aff'd., 313 F. 2d 884 (1963); cert. denied, 373 U.S. 932 (1963).

William A. Smith Contracting Co., IBCA-83 (July 16, 1959)

William A. Smith Contracting Co., et al. v. U.S., Ct. Cl. No. 264-57. Judgment for plaintiff, 292 F. 2d 847 (1961); no appeal.

William A. Smith Contracting Co. v. U.S., Ct. Cl. No. 279-59. Judgment for defendant, 292 F. 2d 854 (1961); no appeal.

Frank Winegar, Shell Oil Co. & D. A. Shale Inc., 74 I.D. 161 (1967)

Shell Oil Co., et al. v. Udall, et al., Civil No. 67-C-321, D. Colo. Judgment for plaintiff, September 18, 1967; no appeal.

W. L. Ridge Construction Co., IBCA-80 (November 30, 1960)

W. L. Ridge v. U.S., Ct. Cl. No. 301-60. Suit dismissed, October 1, 1963.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, 65 I.D. 436 (1958)

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah, Deceased, Comanche Enrolled Restricted Indian No. 1927 v. Jane Asenap, Wilfred Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Dept. of the Interior, & Earl R. Wiseman, District Director of Internal Revenue, Civil No. 8281, W.D. Okla. Dismissed as to the Examiner of Inheritance; plaintiff dismissed suit without prejudice as to the other defendants.

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah v. Stewart L. Udall, Civil No. 2595-60. Judgment for defendant, June 5, 1962; remanded, 312 F. 2d 358 (1962).

Elodymae Zwang, et al., A-30201 (February 3, 1965)

Darrell Zwang & Elodymae Zwang v. Stewart L. Udall, Civil No. 65-716-EC, S.D. Cal. Judgment for defendant, February 23, 1966; aff'd., 371 F. 2d 634 (9th Cir. 1967); no petition.

TABLE OF U.S. CODES, U.S. STATUTES AT LARGE AND REVISED STATUTES

(A) UNITED STATES CODES

TITLE 18:

sec.	1152	77 I.D. 113
	1158	77 I.D. 4

TITLE 23:

sec.	131	IBLA-70-36 (Sept. 25, 1970) p1

TITLE 25:

sec.	48	77 I.D. 49
	70n-1 et seq.	77 I.D. 20
	70n-4	77 I.D. 20
	337	A-31086 (Feb. 2, 1970) p1
	348	M-36806 (June 3, 1970) p11
	372	IA-D-35 (Apr. 16, 1970) p15
		M-36806 (June 3, 1970) p13
	373	77 I.D. 268, 270
		IA-D-35 (Apr. 16, 1970) p10
	378	M-36806 (June 3, 1970) p13
	392	IA-D-35 (Apr. 16, 1970) p11
	452 et seq.	M-36808 (June 18, 1970) p1

TITLE 28:

sec.	1331	M-36801 (Jan. 29, 1970) p19
	1345	M-36801 (Jan. 29, 1970) p19
	1732-1733	77 I.D. 106
	2282	77 I.D. 149
	2516	77 I.D. 213

TITLE 30:

sec.	22	77 I.D. 83
		A-31063 (Apr. 1, 1970) pp12, 13
		IBLA-70-208 (Dec. 2, 1970) p2
	22 et seq.	77 I.D. 97
		A-31036 (Mar. 4, 1970) p2
		A-31133 (Mar. 4, 1970) p3
	23	A-31063 (Apr. 1, 1970) p10
	35	A-31063 (Apr. 1, 1970) p10
		A-31052 (May 13, 1970) p4
	42	A-31050 (Apr. 3, 1970) pp9, 15
		A-31052 (May 13, 1970) p5

TITLE 30 Continued:

sec. 42 (b)	A-31120 (Apr. 17, 1970) p3
161	77 I.D. 97
	A-31052 (May 13, 1970) p4
	IBLA-70-27 (Sept. 23, 1970) p1
181 et seq.	IBLA-70-214(Aug. 4, 1970) p1
184 (h) (2)	77 I.D. 207
187a	77 I.D. 181
188(b)	77 I.D. 181, 207
	A-31095 (Feb. 2, 1970) p1
	A-31087 (Feb. 4, 1970) p1
	A-31148 (Mar. 2, 1970) p2
	A-31159 (Mar. 2, 1970) p1
	A-31117 (Mar. 4, 1970) p1
188 (c)	A-31117 (Mar. 4, 1970) p4
201 (b)	IBLA-70-107 (Sept. 22, 1970) p2
211-214	77 I.D. 124
211(b)	77 I.D. 124
226	A-31095 (Feb. 2, 1970) p5
	A-31173 (May 14, 1970) p1
241	A-31095 (Feb. 2, 1970) p5
322	IBLA-70-208 (Dec. 2, 1970) p2
351-359	IBLA-70-117 (Oct. 30, 1970) p1
352	IBLA-70-117 (Oct. 30, 1970) p3
601	77 I.D. 83
	A-31049 (Mar. 3, 1970) p2
	A-31133 (Mar. 4, 1970) p4
611	77 I.D. 83, 97
	A-31049 (Mar. 3, 1970) p2, 8
	A-31036 (Mar. 4, 1970) p2
	A-31133 (Mar. 4, 1970) p2
	A-31138 (Mar. 4, 1970) p2
	A-31025 (Mar. 27,1970) p1
	A-31036 (Apr. 1, 1970) pp7, 11
	A-31120 (Apr. 17, 1970) p3
	IBLA-70-22 (Sept. 23, 1970) p3
	IBLA-70-27 (Sept. 23, 1970) p1
	IBLA-70-18 (Nov. 23, 1970) p4
611-615	IBLA-70-42 (Dec. 9, 1970) p3
611 et seq.	77 I.D. 14
612	A-31031 (Mar. 25, 1970) p1
613	A-31031 (Mar. 25, 1970) p1
	IBLA-70-48 (Oct. 29, 1970) p2

TITLE 30 Continued:

sec. 701	77 I.D. 14
	A-31080 (Jan. 20, 1970) p1
701-704	A-31141 (Apr. 27, 1970) p1
701 et seq.	IBLA-70-762 (Aug. 3, 1970) p1
701-709	77 I.D. 14, 26
	A-31156 (May 5, 1970) pp1, 2
702	77 I.D. 14, 26
	A-31071 (Jan. 16, 1970) p2
	A-31080 (Jan. 20, 1970) p4
	A-31141 (Apr. 27, 1970) p1
	A-31156 (May 5, 1970) p3
709	77 I.D. 14, 26
	A-31071 (Jan. 16, 1970) p1
	A-31080 (Jan. 20, 1970) p1
	A-31084 (Jan. 27, 1970) p1
	A-31156 (May 5, 1970) p1

TITLE 33:

sec. 403	M-36801 (Jan. 29, 1970) pp6, 8

TITLE 41:

sec. 14	77 I.D. 69

TITLE 43:

sec. 31	77 I.D. 124
164	A-31108 (Apr. 1, 1970) p2
185	77 I.D. 5
274	IBLA-70-4 (Dec. 29, 1970) p1
315f	A-31064 (May 28, 1970) p9
	IBLA-70-36 (Sept. 25, 1970) p2
315m	A-31107 (Mar. 30, 1970) p2
	IBLA-70-24 (Dec. 9, 1970) p1
	IBLA-70-52 (Dec. 30, 1970) p1

TITLE 43 Continued:

sec.
321---------- A-31060 (Mar. 17, 1970) p10
321 et al., ---------- A-31060 (Mar. 17, 1970) p1
321 et seq.---------- A-31064 (May 28, 1970) p12
328---------- A-31060 (Mar. 17, 1970) p10
329---------- A-31060 (Mar. 17, 1970) p10
333---------- A-31060 (Mar. 17, 1970) p9
IBLA-70-21 (Dec. 29, 1970) p3
416---------- 77 I.D. 5
461---------- A-31017 (Feb. 12, 1970) p10
462---------- M-36801 (Jan. 29, 1970) p1
485h(c)---------- 77 I.D. 141
682a---------- IBLA-70-36 (Sept. 25, 1970) p2
682a et seq.---------- 77 I.D. 83
A-31063 (Apr. 1, 1970) p12
682 a-e ---------- 77 I.D. 174
713---------- A-31070 (Jan. 28, 1970) pp1, 3
A-31116 (Mar. 3, 1970) pp1, 2, 3
894-899---------- 77 I.D. 41, 177

1068---------- 77 I.D. 59
A-31038 (May 12, 1970) p1
IBLA-70-55 (Dec. 24, 1970) p1
1068a---------- A-31038 (May 12, 1970) p1
1161---------- A-31120 (Apr. 17, 1970) p2
1171---------- A-31153 (Mar. 3, 1970) p1
1221---------- IBLA-70-135 (Oct. 7, 1970) p1
1301---------- M-36801 (Jan. 29, 1970) p10
1301 (e) ---------- M-36801 (Jan. 29, 1970) p15
1301 et seq.---------- M-36801 (Jan. 29, 1970) pp1, 14
1302---------- M-36801 (Jan. 29, 1970) p14
1331 (a)---------- M-36801 (Jan. 29, 1970) p10
1331 et seq.---------- M-36801 (Jan. 29, 1970) pp1, 7, 9
1332 (a)---------- M-36801 (Jan.29, 1970) p12
1333 (b)---------- M-36801 (Jan. 29, 1970) p19
1333 (f)---------- M-36801 (Jan. 29, 1970) p6
1374---------- 77 I.D. 166
1411---------- A-31082 (Jan. 27, 1970) p1
A-31075 (Feb. 12, 1970) p1
1411-18---------- 77 I.D. 174
1412---------- 77 I.D. 122
1418---------- A-31075 (Feb. 12, 1970) p1
A-31082 (Jan. 27, 1970) p1

TITLE 43 Continued:

sec.	1171	77 I. D. 174

TITLE 48:

sec.	357	IBLA-70-13 (Dec. 7, 1970) p1
	359	A-31017 (Feb. 12, 1970) p8
	376	IBLA-71-67 (Nov. 20, 1970) p1
	461	A-31017 (Feb. 12, 1970) p1
		A-31149 (Apr. 20, 1970) p1
	461a	A-31149 (Apr. 20, 1970) p4

TITLE 49:

sec.	65 (b)	77 I. D. 41, 177
		IBLA-71-17 (Sept. 21, 1970) p1

TITLE 50:

sec.	501 et seq.	A-31080 (Jan. 20, 1970) p2
	510	A-31044 (Apr. 10, 1970) p1
	510 et seq.	A-31044 (Apr. 10, 1970) p3
	510-590	A-31044 (Apr. 10, 1970) p1
	561	A-31080 (Jan. 20, 1970) p2
	562	A-31080 (Jan. 20, 1970) p3
	565	A-31080 (Jan. 20, 1970) p3
	581	A-31044 (Apr. 10, 1970) p3

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(B) UNITED STATES STATUTES

34 STAT: Continued:

sec. 233---------- IBLA-70-66 (Nov. 30, 1970) p1
267---------- M-36806 (June 3, 1970) p3

35 STAT:

sec. 312---------- M-36806 (June 3, 1970) p3
315---------- M-36806 (June 3, 1970) pp7, 9
779---------- Los Angeles 0134981 (Nov. 13, 1970) p1

36 STAT:

sec. 455---------- M-36802 (Mar. 13, 1970) p1
855---------- M-36806 (June 3, 1970) p13
856---------- IA-D-35 (Apr. 16, 1970) p10
989---------- M-36802 (Mar. 13, 1970) p2
1032---------- M-36802 (Mar. 13, 1970) p2

37 STAT:

sec. 87---------- M-36806 (June 3, 1970) p11
265---------- 77 I.D. 265
678---------- 77 I.D. 268, 270
686---------- 77 I.D. 265

38 STAT:

sec. 681---------- M-36802 (Mar. 13, 1970) p5
686---------- 77 I.D. 265

39 STAT:

sec. 123---------- M-36806 (June 3, 1970) p13
535---------- 77 I.D. 69

40 STAT:

sec. 248---------- A-31080 (Jan. 20, 1970) p4
606---------- M-36806 (June 3, 1970) p10

41 STAT:

sec. 438---------- IBLA-70-107 (Sept. 22, 1970) p2

41 STAT Continued:

sec. 1225---------- M-36806 (June 3, 1970) pp14, 16
1248---------- M-36806 (June 3, 1970) p16

43 STAT:

sec. 1012---------- IA-T-24 (Feb. 24, 1970) p6

44 STAT:

sec. 636---------- 77 I.D. 265

45 STAT:

sec. 1069---------- 77 I.D. 5

48 STAT:

sec. 201---------- 77 I.D. 69
596---------- M-36808 (June 18, 1970) p1
984---------- M-36802 (Mar. 13, 1970) p5
987 ---------- 77 I.D. 113

52 STAT:

sec. 609---------- 77 I.D. 174

53 STAT:

sec. 1127---------- M-36806 (June 3, 1970) pp14, 16

54 STAT:

sec. 954---------- 77 I.D. 41
IBLA-71-17 (Sept. 21, 1970) p1

60 STAT:

sec. 237---------- IBLA-70-5 (Nov. 17, 1970) p8
955---------- 77 I.D. 181
1099---------- IBLA-70-333 (Oct. 12, 1970) p1
IBLA-71-64 (Nov. 16, 1970) p1

61 STAT:

sec. 681---------- A-31025 (Mar. 27, 1970) p3
913---------- IBLA-70-117 (Oct. 30, 1970) p3

64 STAT:

sec. 572---------- IA-T-24 (Feb. 24, 1970) p6
1262---------- 77 I.D. 141

67 STAT:

sec. 29---------- M-36801 (Jan. 29, 1970) p1
359---------- 77 I.D. 69
495---------- 77 I.D. 69

68 STAT:

585----------77 I.D. 181
sec. 789---------- IBLA-70-135 (Oct. 7, 1970) p1

69 STAT:

sec. 367---------- 77 I.D. 83
A-31049 (Mar. 3, 1970) p2
IBLA-70-18 (Nov. 23, 1970) p1

74 STAT:

sec. 215---------- A-31086 (Feb. 2, 1970) p2
507---------- 77 I.D. 166

76 STAT:

sec. 943---------- A-31159 (Mar. 2, 1970) p3
1157---------- IBLA-70-66 (Nov. 30, 1970) p1

77 STAT:

sec. 88---------- A-31025 (Mar. 27, 1970) p1
301---------- 77 I.D. 20

78 STAT:

sec. 986---------- 77 I.D. 174

81 STAT:

sec. 54---------- M-36808 (June 18, 1970) p1

82 STAT:

sec. 906---------- 77 I.D. 69

83 STAT:

sec. 147---------- 77 I.D. 20
323---------- 77 I.D. 141
333---------- 77 I.D. 141
447---------- 77 I.D. 20

(C) REVISED STATUTES

sec. 1873---------- 77 I.D. 113
2072---------- 77 I.D. 49
2146---------- 77 I.D. 113
2319 et seq.---------- A-31036 (Mar. 4, 1970) p2
A-31063 (Apr. 1, 1970) p13
2337---------- A-31050 (Apr. 3, 1970) p15
2382---------- A-31070 (Jan. 28, 1970) pp1, 3
A-31116 (Mar. 3, 1970) pp1, 2, 3
3736---------- 77 I.D. 69

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ACCOUNTS

REFUNDS

Where a noncompetitive oil and gas lease is cancelled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion

Beard Oil Company, IBLA 70-19 (Oct. 7, 1970)
77 I.D. 166

ACT OF MARCH 3, 1909

When the terms of a special Act of Congress have been complied with, and regulations thereunder no longer are effective, a pending application under such act must be considered in accordance with existing conditions.

Mary Garewall Gill, Los Angeles 0134981 (Nov. 13, 1970)

ACT OF JUNE 1, 1910

The act of June 1, 1910, 36 Stat. 455 providing for sale of surplus land within the Fort Berthold Indian Reservation and further providing for additional allotments in a designated portion of the area did not diminish the reservation and

ACT OF JUNE 1, 1910--Continued

change the boundary to the area designated for additional allotments; other provisions of the act manifested an intent that the Indians of Fort Berthold Reservation retained a substantial interest in the area opened to sale and provisions for donation and expenditure of their funds and property were authorized to that end. Authorization for sale of the land within the reservation did not change the boundary of the reservation nor remove the sale area from reservation status.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

ACT OF AUGUST 8, 1953

A right-of-way within the meaning of Section 1 (7) of the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b(7) (1964) which authorizes the Secretary of the Interior to acquire lands and interests in lands, including scenic easements, in lands adjacent to a road right-of-way located within area of the National Park System, need not be limited to only roads open to vehicular motor traffic. The towpath of the Chesapeake and Ohio Canal National Monument is a road right-of-way within the meaning of that act.

Donation and Acceptance of "Scenic Easements" in the Vicinity of the Chesapeake and Ohio Canal National Monument, M-36805 (May 12, 1970)
77 I.D. 69

ACT OF NOVEMBER 4, 1963

When a tribe receives separate loans for expert assistance on several claims against the United States, repayment from an award on a claim is only required to the extent needed to repay the loan made for expert assistance on the particular claim on which the award was granted.

Repayment of Expert Assistance Loans, M-36800 (Feb. 20, 1970) 77 I. D. 20

ACT OF JUNE 5, 1967

Identifiable records under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, as amended, 25 U. S. C. secs. 452 et seq., accumulated in Bureau of Indian Affairs offices, including but not limited to contracts, programs, proposals, and budgets, shall be made available to any person who requests them, pursuant to, and subject to such restrictions as are contained in, the provisions of the Freedom of Information Act of 1967, 43 CFR 2.2, and 15 BIAM ch. 6.

Availability to the Public of Johnson-O'Malley Act Records, M-36808 (June 18, 1970)

ADMINISTRATIVE PRACTICE

It is not an abuse of discretion for a hearing examiner to deny a second continuance of a hearing to permit a mining claimant to have his claims examined by a mining expert after the time allowed under a previous continuance has expired without any apparent effort on the part of the claimant to secure the examination, and there is no abuse of discretion on the part of a hearing examiner in failing to order a prehearing conference where none is requested.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

The fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of res judicata, from bringing adverse proceedings against the claim when an application for patent to the claim is files.

United States v. H. B. Webb, IBLA 70-33 (Oct. 15, 1970)

ADMINISTRATIVE PROCEDURE ACT

HEARING EXAMINERS

A hearing officer is not disqualified nor will his findings be set aside in a mining contest upon a charge of bias in the absence of a substantial showing of bias.

United States v. Elsie Cody, IBLA 70-23 (Nov. 13, 1970)

ADMINISTRATIVE PROCEDURE ACT--Continued

PUBLIC INFORMATION

Where a substantial change is made in the procedure which the public must follow in dealing with an agency as a result of delegation of direction of Federal employees pursuant to the provision of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), the provisions of the Administrative Procedure Act, 5 U.S.C. secs. 551-559 (Supp. IV, 1965-1968), requiring public notice of description of agency organization and channels through which public may deal with the agency must be complied with.

Authority of the Bureau of Indian Affairs to Transfer To An Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R.S. Sec. 2072, 25 U.S.C. Sec. 48, (Apr. 3, 1970) M-36803 77 I.D.49

ALASKA

HOMESTEADS

Since a withdrawal made by Public Land Order 4582 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

Louis J. Hobbs A-31051 (Jan. 15, 1970) 77 I.D. 5

The Department does not have authority to extend the 5-year life of a homestead entry to permit the entryman to construct a habitable house on it after the expiration of the 5-year period and an entry will be canceled if the entryman concedes that the requirement was not met during the 5-year life of the entry.

Mrs. Harril Berry, A-31108 (Apr. 1, 1970)

ALASKA--Continued

HOMESTEADS-- Continued

Where the cultivation attempted on muskeg land in Alaska consisted of disking and seeding, without removal of the natural vegetative cover, and it appears that the disking resulted only in the slicing of the vegetative mat without breaking of the underlying soil, the cultivation requirements of the homestead law have not been satisfied, and, to the extent to which it shows such cultivation, homestead final proof is properly rejected.

United States v. Dale Gladys Garrett, A-31064 (May 28, 1970)

INDIAN AND NATIVE AFFAIRS

Where an application for a native allotment under the act of May 17, 1906, as amended, describes land, which at the time of filing is included in a State of Alaska selection application that had been tentatively approved to the State, and alleges occupancy from a date prior to the filing of the State selection, and where evidence of the applicant's occupancy has not been developed, the rejection of the allotment application will be set aside and the case remanded for further investigation of the alleged occupancy.

Archie Wheeler, IBLA 70-13 (Dec. 7, 1970)

LAND GRANTS AND SELECTIONS

Generally

Where an application for a native allotment under the act of May 17, 1906, as amended, describes land, which at the time of filing is included in a State of Alaska selection application that had been tentatively approved to the State, and alleges occupancy from a date prior to the filing of the State selection, and where evidence of the applicant's occupancy has not been developed, the rejection of the allotment application will be set aside and the

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

Generally--Continued

case remanded for further investigation of the alleged occupancy.

Archie Wheeler, IBLA 70-13 (Dec. 7, 1970)

POSSESSORY RIGHTS

Where, in accordance with the provisions of section 10 of the act of May 14, 1898, a proceeding is instituted in a State court of Alaska to determine the right of possession between adverse parties claiming land as a trade and manufacturing site, but the case is dismissed by the court upon failure of the plaintiff to appear in court to prosecute, the action of the court is determinative of the issue of possessory rights, and the plaintiff is estopped thereafter from asserting any claim to the land on the basis of priority of the location of his trade and manufacturing site.

Seldon H. Klinke, A-31017 (Feb. 12, 1970)

TRADE AND MANUFACTURING SITES

Where land within a trade and manufacturing site is withdrawn from such and other appropriation prior to its occupancy and possession for purposes of trade and manufacture, the claim cannot be perfected and the recordation of the notice of settlement may be vacated to apprise the claimant of the situation.

David G. Marks, A-31082 (Jan. 27, 1970)

Where land within a trade and manufacturing site is withdrawn from such and other appropriation prior to its occupancy and use for purposes of trade and manufacture, the claim cannot be perfected and the recordation of the notice of settlement may be vacated to apprise the claimant of the situation.

Boyd E. Keeling, A-31075 (Feb. 12, 1970)

ALASKA--Continued

TRADE AND MANUFACTURING SITES--Continued

Where an application for a trade and manufacturing site is approved by a land office as to a part of the land applied for while being rejected as to the remainder, and where, on appeal to the Director, Bureau of Land Management, from the partial rejection of the application, it is rejected in its entirety, the rejection will be set aside in part and the case will be remanded for the development of additional factual data if the evidence of record is insufficient to show clearly to what extent there has been compliance with the requirements of the law as to part of the land.

An application to purchase land embraced in a trade and manufacturing site must be based upon occupancy and use of the land as the site of some commercial enterprise and cannot be based upon the use of the land in connection with a business the objective of which is the sale or other disposition of the land itself.

Where, in accordance with the provisions of section 10 of the act of May 14, 1898, a proceeding is instituted in a State court of Alaska to determine the right of possession between adverse parties claiming land as a trade and manufacturing site but the case is dismissed by the court upon failure of the plaintiff to appear in court to prosecute, the action of the court is determinative of the issue of possessory rights, and the plaintiff is estopped thereafter from asserting any claim to the land on the basis of priority of the location of his trade and manufacturing site.

Seldon H. Klinke, A-31017 (Feb. 12, 1970)

An applicant desiring to purchase a trade and manufacturing site must show that he is occupying the site for one of the purposes stated in the act and if he cannot do so, because his land previously became unsuitable for such occupancy as a result of an earthquake, his application must be rejected.

A hearing will not be granted in connection with a trade and manufacturing site application where the applicant fails to allege facts which, if proved, would entitle him to favorable consideration of his application.

Carl A. Bracale, Jr., A-31149 (Apr. 20, 1970)

APPLICATIONS AND ENTRIES

PRIORITY

Where, in accordance with the provisions of section 10 of the act of May 14, 1898, a proceeding is instituted in a State court of Alaska to determine the right of possession between adverse parties claiming land as a trade and manufacturing site, but the case is dismissed by the court upon failure of the plaintiff to appear in court to prosecute, the action of the court is determinative of the issue of possessory rights, and the plaintiff is estopped thereafter from asserting any claim to the land on the basis of priority of the location of his trade and manufacturing site.

Seldon H. Klinke, A-31017 (Feb. 12, 1970)

APPROPRIATIONS

Under the appropriation Act for the Department of the Interior for fiscal 1970, 83 Stat. 147, there may be paid out of an award of the Indian Claims Commission only the attorney fees and expenses of litigation incurred in obtaining the award, plus expenses for program planning, until other legislation authorizes other use of the award.

Repayment of Expert Assistance Loans, M-36800 (Feb. 20, 1970) 77 I. D. 20

ATTORNEYS

The Hearing Examiner in proceedings conducted pursuant to 25 CFR 15.0-15.34 has neither the duty nor the authority to appoint or otherwise secure the services of an attorney for an interested party.

Estate of Otto Littleman (Lame Woman), IA-T-25 (June 5, 1970)

BONNEVILLE POWER ADMINISTRATION

GENERALLY

The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which BPA takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable.

Bonneville Power Administration Net Billing Agreements Relating to the Hydro-Thermal Power Program, M-36812 (Sept. 21, 1970) 77 I.D. 141

BOUNDARIES

(See also Surveys of Public Lands)

The general rule governing changes in reservation boundaries is that when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress; no authority exists for an administrative change in reservation boundaries. Whether Congress intended to change a reservation boundary by an act would be reflected primarily by the act itself and its legislative history. Sale of land within the boundaries of the Fort Berthold Indian Reservation pursuant to Congressional authority did not change the boundaries nor remove the land from reservation status.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

BUREAU OF INDIAN AFFAIRS

Identifiable records under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, as amended, 25 U.S.C. secs. 452 et seq., accumulated in Bureau of Indian Affairs offices, including but not limited to contracts, programs, proposals, and budgets, shall be made available to any person who requests them, pursuant to, and subject to such restrictions as are contained in, the provisions of the Freedom of Information Act of 1967, 43 CFR 2.2, and 15 BIAM ch. 6.

Availability to the Public of Johnson-O'Malley Act Records, M-36808 (June 18, 1970)

BUREAU OF RECLAMATION

EXCESS LANDS

Involving 319.3 acres of land covered by water right applications under Sec. 5 of the 1902 Act (31 Stat. 790) and Sec. 3 of the 1912 Act (37 Stat. 265); when full payout of construction charges has been made and when the Secretary determines that a general pattern of family-size ownership has been established in the area, then the Secretary must deliver water, if available, to the entire tract, including the 159.3 acres of "excess" lands.

Excess Land Ownership, Reservation Division -- Yuma Project, California (El Rancho Del Rio, Inc.) M-36818 (Dec. 30, 1970) 77 I. D. 265

COLOR OR CLAIM OF TITLE

GENERALLY

Where applicants for land under the Color of Title Act have shown deeds giving color of title to three lots back to 1890, and there is nothing in the deeds or Bureau records showing lack of good faith on the part of the holders in the chain of title, a Bureau decision rejecting the application of the ground that there was no good faith holding of the land under a claim or color of title will be reversed and the case remanded for further processing to ascertain whether the improvement or cultivation requirements for a class 1 claim have been met, or whether taxes have been paid back to January 1, 1901, to support a class 2 claim.

H. F. Gerbaz et al., A-31039 (Apr. 24, 1970) 77 I. D. 59

APPRAISED VALUE

Where the purchase price for a tract of land for which application has been made under the Color of Title Act is based upon a Bureau of Land Management appraisal of the fair market value of the land at the date of the appraisal, the appraisal will not be disturbed upon evidence that, in another appraiser's opinion, based upon an estimate of the net income to be derived from the sale of the land for a particular purpose, the value of the land, at the time of the Bureau's appraisal, was substantially less than the Bureau found it to be;

COLOR OR CLAIM OF TITLE--Continued

APPRAISED VALUE--Continued

however, in setting the purchase price, the appraised value is properly reduced to reflect equities of the applicant.

The equities of an applicant which may be considered in determining the purchase price of a tract of land to be sold under the Color of Title Act are not limited to those items for which there is a determinable monetary value, but they include all factors which, in a spirit of fairness, a court of equity would recognize.

A. F. Dantzler, A-31038 (May 12, 1970)

CULTIVATION AND IMPROVEMENTS

A class 1 application for patent under the Color of Title Act will be denied where the applicant fails to show the satisfaction of the Secretary that valuable improvements have been placed upon the land and no part of it has been cultivated.

Roy Pugh, IBLA 70-55 (Dec. 24, 1970)

DESCRIPTION OF LAND

Deeds which describe by regular survey subdivisions lands which in a regular surveyed section would extend to the northernmost and westernmost boundaries of a section give color of title to lots in an irregular section which fall within the area normally described by such aliquot parts.

H. F. Gerbaz et al., A-31039 (Apr. 24, 1970) 77 I. D. 59

GOOD FAITH

Where color of title to a narrow strip of land lying along the west and north boundaries of a section derives originally from a homestead patent and is based on deeds which describe the patented land in terms of regular subdivisions which would be

COLOR OR CLAIM OF TITLE --Continued

GOOD FAITH--Continued

expected to extend to the west and north boundaries of the section, the fact that a resurvey of the section, which divides it into lots, is susceptible of, but does not necessarily require, the interpretation that the homestead entry did not include the strip of land in question does not support the conclusion that the grantees of the strip did not hold it in good faith.

H. F. Gerbaz et al., A-31039 (Apr. 24, 1970)
77 I. D. 59

An applicant under the Color of Title Act is not entitled to a patent if he did not acquire his color o title in good faith without knowledge of the defect in title.

Roy Pugh, 1BLA 70-55 (Dec. 24, 1970)

CONTESTS AND PROTESTS
(See also Rules of Practice)

GENERALLY

A ruling by a hearing examiner denying a motion to dismiss some of the charges brought against a homestead entry on the ground that they relate to matters shown by the records of the Bureau of Land Management is an interlocutory order which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the contest.

Paul Unruh v. Wesley Laverne Edwards, A-31083 (Apr. 9, 1970)

PREFERENCE RIGHT OF CONTESTANT

Since a withdrawal made by Public Land Order 4582 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

Louis J. Hobbs A-31051 (Jan. 15, 1970)
77 I. D. 5

CONTRACTS
(See also Rules of Practice)

GENERALLY

Acts, as well as words, are to be considered in determining whether or not an offer has been accepted, and where, after an oral agreement has been made for the sale of timber, the purchaser indicates dissatisfaction with some terms imposed by the vendor but, nevertheless, cuts and removes the timber, the purchaser's actions are more reasonably construed as acts in the performance of a contract than as the repudiation of the oral agreement and the tortious taking of the timber.

A provision in a timber sale contract requiring advance payment for and the securing of written permission to cut additional timber, not included in the original contract, which the Government has agreed to sell, in the absence of language clearly indicating such intent, will not be construed as imposing a condition precedent to the formation of a contract; where, after it has been agreed by representatives of the Bureau of Land Management and the purchaser under such a contract that designated additional timber should also be cut, the purchaser cuts and removes the timber prior to making payment therefor and prior to receiving permission to cut, his actions constitute a violation of the terms of the contract for which the Government is entitled to recover compensatory damages, but they do not constitute trespass.

Forest Management, Inc., A-31045 (Feb. 6, 1970)

CONSTRUCTION AND OPERATION

Generally

Under the terms of a special contract provision the Board finds that a contractor is entitled to compensation for the cost of repair work to road subgrade performed before acceptance when the proof shows that the damage was caused by extraordinary action of the elements.

Appeal of the Brezina Construction Company, Inc., IBCA-757-1-69 (Nov. 20, 1970)

Actions of Parties

Where upon review of the drawings and specifications the Board determines that chain link fencing around a swimming pool was a contractual requirement and that the contractor's interpretation of the drawings and specifications was unreasonable, the contractor's claim for additional compensation was denied.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 1970)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

Where a contract specification for pole top preservative required the preservative to be "suitable for troweling" and contained penetrometer test values which were the only objective method of determining consistency of the material and where it was determined that there was no correlation between the penetrometer test values in the specification and the subjective determination of "suitable for troweling," the Board finds that rejection of the material after the penetrometer values in the specification had been waived constituted a constructive change entitling the contractor to an equitable adjustment.

Appeal of Kamphausen Northwest, Inc.,
IBCA-736-10-68 (Nov. 4, 1970)

Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so.

Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs.

Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract.

Where a contractor's initial proposal in response

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee remained unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee.

Where excavation exceeding estimated quantities in a cost-plus-a-fixed-fee construction contract was attributable to design changes the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee.

Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable.

Where a supervisory employee of a cost-plus-a-fixed-fee construction contractor was given a jeep as an inducement to remain in the contractor's employ and where the employee's compensation including the jeep was fair and reasonable, the Board determined that the cost of the jeep was an allowable cost of the contract

Where a regulation in effect at the time of execution of a cost-plus-a-fixed-fee construction contract provided that the costs of storing records subsequent to contract completion were not allowable, the contractor's claim for such costs was denied.

Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied.

Appeal of Franklin W. Peters and Associates,
IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs

Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so.

Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs.

Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract.

Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee remained unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee.

Where excavation exceeding estimated quantities in a cost-plus-a-fixed-fee construction contract was attributable to design changes the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee.

Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable.

Where a supervisory employee of a cost-plus-a-fixed-fee construction contractor was given a jeep as an inducement to remain in the contractor's employ and where the employee's compensation including the jeep was fair and reasonable, the Board determined that the cost of the jeep was an allowable cost of the contract

Where a regulation in effect at the time of execution of a cost-plus-a-fixed-fee construction contract provided that the costs of storing records subsequent to contract completion were not allowable, the contractor's claim for such costs was denied.

A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction.

Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

Changed Conditions

In denying a contractor's claim of changed conditions attributed to hidden springs having been encountered in the course of constructing a road embankment, the Board finds (i) that the contract clearly indicated that subsurface water was anticipated and (ii) that the hidden springs may not have been evident upon a site inspection is of no avail where a review of the contract documents would have apprised the contractor of the conditions of which it complains.

Appeal of Service Construction Corporation, IBCA-678-10-69 (Jan. 12, 1970)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions--Continued

A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice.

Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

Appeals of Al Johnson Construction Company and Morrison-Knudsen Company, Inc. and Al Johnson Construction Company, IBCA-789-7-69 and IBCA-790-7-69 (Sept. 30, 1970) 77 I.D. 127

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions--Continued

When on a tree thinning contract the actual numbers of trees thinned per acre exceeds the specification number per acre stated as an approximation by a significant amount, the contractor is entitled to an equitable adjustment for the increase in quantity as a changed condition.

Appeal of Benson Tree Company, IBCA-812-11-69 (Nov. 10, 1970)

Changes and Extras

Where the Government acknowledged that a specification requirement for driving piles within a 2-inch tolerance could not be met, the Board determined that the deficient and misleading specification resulted in the contractor doing additional work in the pulling, twisting and aligning of the piles to make it possible to fasten glue lam beams, for which the contractor was entitled to an equitable adjustment as a constructive change. A claim for additional work involved in installation of floors, walls and roof to accommodate the piles was denied, however, on the grounds that the contractor had failed to show (i) that the piles used were unsuitable for the job, or (ii) that, insofar as such work was concerned, he had been misled in any way by the specifications.

Two claims for additional compensation are denied where the Board finds (i) that the contractor's interpretation of the disputed contract requirement for the installation of jute mesh was unreasonable, and (ii) that no ambiguity or deficiency had been shown to exist in the door plans for the small buildings.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

The release of transmission line right-of-way in discontinuous lengths which seriously disrupts the right-of-way clearing operation results in a constructive change entitling the contractor to an equitable adjustment for the added costs of clearing due to the disruption of work.

Appeal of L. O. Brayton & Company, IBLA-641-5-67 (Oct. 16, 1970) 77 I. D. 187

When, at the time the contractor commences work, the Government (i) presents to the contractor a revised set of drawings for a sprinkler irrigation system and (ii) modifies the design of a fence from a contour fence to a stepped fence, the contractor is entitled to an equitable adjustment and time extensions for the constructive changes effected.

Appeal of Herman H. Neumann Construction Company, IBCA-761-1-69 (Oct. 16, 1970)

Where a contract specification for pole top preservative required the preservative to be "suitable for troweling" and contained penetrometer test values which were the only objective method of determining consistency of the material and where it was determined that there was no correlation between the penetrometer test values in the specification and the subjective determination of "suitable for troweling," the Board finds that rejection of the material after the penetrometer values in the specification had been waived constituted a constructive change entitling the contractor to an equitable adjustment.

Appeal of Kamphausen Northwest, Inc., IBCA-736-10-68 (Nov. 4, 1970)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I. D. 213

The contractor is entitled to compensation for a change for moving a transmission line tower approximately 80 feet from where it had been erected to where it should have been erected when the evidence shows that the contractor had initially erected the tower on a site staked by the Government as the tower site and contractor had made an adequate check of such site before erecting the tower.

Appeal of the Brandon Company, IBCA-758-1-69 (Dec. 29, 1970) 77 I. D. 260

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications

A well driller is entitled to an equitable adjustment for a constructive change where a preponderance of evidence showed that a significant layer of fine sand was encountered for which the Government specified gravel pack was too coarse measured by the Government's own design criteria, and where the well had collapsed at the level where the fine sands were encountered. The Board denied an equitable adjustment for a second collapsed well, however, on the ground that the evidence failed to show that the collapse was due to the inadequacy of the Government's design.

Appeal of Beylik Drilling, Inc., IBCA-747-12-68 (Feb. 16, 1970)

The Board denies a claim for additional compensation where an examination of the plans and specifications rebuts a contractor's contention that they indicated sufficient suitable soil would be available from excavation to construct the embankment and the contractor fails to offer any evidence to show that such variation as existed between staking and the plans exceeded the limits of permissible deviation.

Appeal of Lawrence L. Jaeger, IBCA-774-4-69 (Feb. 19, 1970)

When there is a conflict between drawings, and the evidence shows that the conflict was not obvious or patent, a contractor is entitled to an equitable adjustment for the additional expense attributable to the Government's design and coordination failures and to an appropriate time extension.

Appeal of L. J. Robinson, Inc., IBCA-772-4-69 (Feb. 25, 1970) 77 I.D. 22

Where the Government acknowledged that a specification requirement for driving piles within a 2-inch tolerance could not be met, the Board determined that the deficient and misleading specification resulted in the contractor doing additional work in the pulling, twisting and aligning of the piles to make it possible to fasten glue lam beams, for which the contractor was entitled to an equitable adjustment as a constructive change. A claim for additional work involved in installation of floors, walls and roof to accommodate the piles was denied, however, on the grounds that the contractor had failed to show (i) that the piles used were unsuitable for the job, or (ii) that, insofar as such work was concerned, he had been misled in any way by the specifications.

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

Two claims for additional compensation are denied where the Board finds (i) that the contractor's interpretation of the disputed contract requirement for the installation of jute mesh was unreasonable, and (ii) that no ambiguity or deficiency had been shown to exist in the door plans for the small buildings.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

Where the specifications are specific and complete as to the inclusion of the disputed work in the contract, a claim for an equitable adjustment for a constructive change, based upon omission of details in the drawings, is denied in accordance with Article 2 of Standard Form 23-A which states that anything mentioned in the specifications and not shown on the drawings shall be of like effect as if shown or mentioned in both.

Appeal of Baldi Construction Engineering, Inc., IBCA-679-10-67 (Apr. 9, 1970) 77 I.D. 57

Where upon review of the drawings and specifications the Board determines that chain link fencing around a swimming pool was a contractual requirement and that the contractor's interpretation of the drawings and specifications was unreasonable, the contractor's claim for additional compensation was denied.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 1970)

Where a contract specification for pole top preservative required the preservative to be "suitable for troweling" and contained penetrometer test values which were the only objective method of determining consistency of the material and where it was determined that there was no correlation between the penetrometer test values in the specification and the subjective determination of "suitable for troweling," the Board finds that rejection of the material after the penetrometer values in the specification had been waived constituted a constructive change entitling the contractor to an equitable adjustment.

Appeal of Kamphausen Northwest, Inc., IBCA-736-10-68 (Nov. 4, 1970)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Estimated Quantities

In denying a contractor's claim of changed conditions attributed to hidden springs having been encountered in the course of constructing a road embankment, the Board finds (i) that the contract clearly indicated that subsurface water was anticipated and (ii) that the hidden springs may not have been evident upon a site inspection is of no avail where a review of the contract documents would have apprised the contractor of the conditions of which it complains.

Appeal of Service Construction Corporation, IBCA-678-10-69 (Jan. 12, 1970)

When on a tree thinning contract the actual numbers of trees thinned per acre exceeds the specification number per acre stated as an approximation by a significant amount, the contractor is entitled to an equitable adjustment for the increase in quantity as a changed condition.

Appeal of Benson Tree Company, IBCA-812-11-69 (Nov. 10, 1970)

Where excavation exceeding estimated quantities in a cost-plus-a-fixed-fee construction contract was attributable to design changes the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

General Rules of Construction

The contractor is entitled to compensation for a change for moving a transmission line tower approximately 80 feet from where it had been erected to where it should have been erected when the evidence shows that the contractor had initially erected the tower on a site staked by the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

Government as the tower site and contractor had made an adequate check of such site before erecting the tower.

Appeal of the Brandon Company, IBCA-758-1-69 (Dec. 29, 1970) 77 I.D. 260

Government-Furnished Property

An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing.

Appeal of Guy F. Atkinson Company, IBCA-795-8-69 (Jan. 6, 1970) 77 I.D. 1

Intent of Parties

Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

Modification of Contracts

Where the purchaser under a timber sale contract is charged by the Bureau of Land Management with a breach of contract requirements pertaining to the surfacing of roads and the purchaser contends that the requirements were orally

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Modification of Contracts--Continued

modified by the parties and that it met the modified requirements, a hearing will be ordered to resolve the dispute as to the modification and the performance; however, if the purchaser does not wish a hearing and none is held, the determination that it breached the contract will stand since it has the burden of proving that the contract was orally modified.

Parker Industries, Inc., A-31018 (Feb. 6, 1970)

Notices

Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

Appeals of John H. Moon & Sons, Inc., IBCA-814-12-69, IBCA-815-12-69 (May 14, 1970) 77 I.D. 78

When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay.

Appeal of L. O. Brayton & Company, IBLA-641-5-67 (Oct. 16, 1970) 77 I.D. 187

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Privity of Contract

The board denied the Government's motion to dismiss an appeal based on lack of privity between the Government and the subcontractor which performed the disputed work for which additional compensation was claimed where it finds: (i) the prime contractor authorized prosecution of the appeal in its name, and (ii) the agreements between the prime and subcontractor did not contain express exculpatory language relieving the prime contractor of liability to the subcontractor.

Appeal of Fulcrum Corporation of New Jersey, IBCA-745-11-68 (June 11, 1970)

Subcontractors and Suppliers

The board denied the Government's motion to dismiss an appeal based on lack of privity between the Government and the subcontractor which performed the disputed work for which additional compensation was claimed where it finds: (i) the prime contractor authorized prosecution of the appeal in its name, and (ii) the agreements between the prime and subcontractor did not contain express exculpatory language relieving the prime contractor of liability to the subcontractor.

Appeal of Fulcrum Corporation of New Jersey, IBCA-745-11-68 (June 11, 1970)

Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Subcontractors and Suppliers --Continued

A contractor's claims for excusable delay based upo an equipment breakdown and machining difficultie encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not per se a basis for excusable delay. While under the rule of Schweigert v. United States, 181 Ct. Cl. 1184, a contractor is entitled to be excused foi delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where the contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

Appeal of Fulton Shipyard, IBCA-735-10-68 (Dec. 29, 1970) 77 I.D. 249

DISPUTES AND REMEDIES

Burden of Proof

Two claims for additional compensation are denied where the Board finds (i) that the contractor's interpretation of the disputed contract requirement for the installation of jute mesh was unreasonable, and (ii) that no ambiguity or deficiency had been shown to exist in the door plans for the small buildings.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

An appeal will be denied where the appellant offers no proof in support of its claims. Appellant bears the burden of proving its allegations.

Appeal of Fulcrum Corporation of New Jersey, IBCA-745-11-68 (June 11, 1970)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice.

Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

Appeals of Al Johnson Construction Company and Morrison-Knudsen Company, Inc. and Al Johnson Construction Company, IBCA-789-7-69 and IBCA-790-7-69 (Sept. 30, 1970) 77 I.D. 127

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

The Board will render a jury verdict award of compensation where the contractor has shown that some compensable extra work was performed in repairing storm damage but has not produced specific evidence of the costs of such compensable extra work.

Appeal of the Brezina Construction Company, Inc., IBCA-757-1-69 (Nov. 20, 1970)

Where the Government admitted that rainfall 50 percent or more above normal occurred during certain months, but the contractor's evidence indicated that normal rainfall would also stop the work and did not distinguish between delays caused by normal and abnormal rainfall, its claim for excusable delay based on unusually severe weather was denied. A claim of excusable delay based on the operation of the priorities system under the Defense Production Act was granted.

Appeal of Fulton Shipyard, IBCA-735-10-68 (Dec. 29, 1970) 77 I. D. 249

Damages

Generally

The Board will render a jury verdict award of compensation where the contractor has shown that some compensable extra work was performed in repairing storm damage but has not produced specific evidence of the costs of such compensable extra work.

Appeal of the Brezina Construction Company, Inc., IBCA-757-1-69 (Nov. 20, 1970)

Liquidated Damages

A provision for liquidated damages at a flat rate which makes no allowance for partial deliveries or for the contract value of undelivered material is an unenforceable penalty.

Appeal of Graybar Electric Company, IBCA-773-4-69 (Feb. 12, 1970)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Liquidated Damages--Continued

Under a contract providing for the assessment of liquidated damages for delayed performance, the Board finds that the contractor was excusably delayed by reason of unusually severe weather and other causes and that in the special circumstances shown to be present the date for commencing performance had been improperly calculated to be the day after the date of receipt of the notice to proceed.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

Upon the basis of the entire record, including evidence introduced at a hearing, the Board determined that appellant was entitled to an extension of performance time of seven days because of unusually severe weather.

The Board determined that a project involving the construction of two swimming pools and bathhouses had been substantially completed at dates earlier than those determined by the contracting officer where the evidence established that the project was 98 percent complete and was capable of serving its intended purpose.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 197[illegible]

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Liquidated Damages--Continued

A provision for liquidated damages in a contract to supply six transformers for the sum of $2,562, which called for liquidated damages to be imposed at a rate of $50 a day for the first 15 days of delay in delivery and $100 a day for each day thereafter, and which was the basis of an assessment of $8000, against the contractor, constitutes an unenforceable penalty since in the circumstances presented the Board found the damages assessable were not a reasonable forecast of just compensation for the harm caused by the breach.

Appeal of Allis-Chalmers Manufacturing Company, IBCA-796-8-69 (May 13, 1970) 77 I.D. 74

Acting upon a Government's motion for reconsideration and addressing itself to the question of whether the liquidated damages involved constituted a penalty, the Board determined that where under a contract for the construction of two swimming pools and bathhouses there was an unexcused delay in performance, the contractor was to be assessed liquidated damages at one rate or another depending upon whether one or both of the pools remained to be completed. The Board also determined that in computing liquidated damages, the scheduled day for completion of performance is excluded and the day of actual completion is included.

Appeal of J & B Construction Company, Inc., IBCA-667-9-67 (June 18, 1970)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Liquidated Damages--Continued

Since actual damage is not a prerequisite to the validity of a provision for liquidated damages, the Government's admission that it suffered no actual damage did not preclude enforcement of a liquidated damages clause.

A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not per se a basis for excusable delay. While under the rule of Schweigert v. United States, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

Appeal of Fulton Shipyard, IBCA-735-10-68 (Dec. 29, 1970) 77 I.D. 249

Equitable Adjustments

A well driller is entitled to an equitable adjustment for a constructive change where a preponderance of evidence showed that a significant layer of fine sand was encountered for which the Government specified gravel pack was too coarse measured by the Government's own design criteria, and where the well had collapsed at the level where the fine sands were encountered. The Board denied an equitable adjustment for a second collapsed well, however, on the ground that the evidence failed to show that the collapse was due to the inadequacy of the Government's design.

Appeal of Beylik Drilling, Inc., IBCA-747-12-68 (Feb. 16, 1970)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments

The Board denies a claim for additional compensation where an examination of the plans and specifications rebuts a contractor's contention that they indicated sufficient suitable soil would be available from excavation to construct the embankment and the contractor fails to offer any evidence to show that such variation as existed between staking and the plans exceeded the limits of permissible deviation.

Appeal of Lawrence L. Jaeger, IBCA-774-4-69 (Feb. 19, 1970)

In the absence of actual cost data for a large part of the claimed extra costs and in circumstances where estimates of such costs have been based primarily on formula cost of ownership figures for equipment for the time involved, formula calculations of fuel and oil costs, and a pro rata distribution of labor costs, the Board will use a jury verdict approach to determine the amount of an equitable adjustment for a changed condition to which the contractor is entitled.

Appeal of Ray D. Bolander Company, Inc., IBCA-331 (Mar. 30, 1970) 77 I. D. 31

When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay.

The release of transmission line right-of-way in discontinuous lengths which seriously disrupts the right-of-way clearing operation results in a constructive change entitling the contractor to an equitable adjustment for the added costs of clearing due to the disruption of work.

A written order to the contractor to complete work by the date fixed in the contract for completion is an order to accelerate constituting a change when at the time of issuance the contractor was admittedly entitled to extensions of time which had been requested but not yet granted, and the contractor in fact accelerates. The contractor is entitled to an equitable adjustment for the increased costs due to the accelerated effort.

Appeal of L. O. Brayton & Company, IBCA-641-5-67 (Oct. 16, 1970) 77 I. D. 187

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

When, at the time the contractor commences work, the Government (i) presents to the contractor a revised set of drawings for a sprinkler irrigation system and (ii) modifies the design of a fence from a contour fence to a stepped fence, the contractor is entitled to an equitable adjustment and time extensions for the constructive changes effected.

Appeal of Herman H. Neumann Construction Company, IBCA-761-1-69 (Oct. 16, 1970)

Jurisdiction

An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing.

Appeal of Guy F. Atkinson Company, IBCA-795-8-69 (Jan. 6, 1970) 77 I. D. 1

The Board's jurisdiction being appellate only, a claim not previously submitted to the contracting officer will be remanded to him for his decision.

Appeal of Baldi Construction Engineering, Inc., IBCA-679-10-67 (Apr. 9, 1970) 77 I. D. 57

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

The board denied the Government's motion to dismiss an appeal based on lack of privity between the Government and the subcontractor which performed the disputed work for which additional compensation was claimed where it finds: (i) the prime contractor authorized prosecution of the appeal in its name, and (ii) the agreements between the prime and subcontractor did not contain express exculpatory language relieving the prime contractor of liability to the subcontractor.

Appeal of Fulcrum Corporation of New Jersey,
IBCA-745-11-68 (June 11, 1970)

A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction.

A cost-plus-a-fixed-fee construction contractor's claim for special termination costs which had not been passed upon by the contracting officer would be remanded since the Board's jurisdiction is appellate only.

Appeal of Franklin W. Peters and Associates,
IBCA-762-1-69 (Dec. 28, 1970) 77 I. D. 213

Substantial Evidence

A motion by an appellant to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (1) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hearing; and (v) as for summaries and other exhibits expunged from the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Substantial Evidence--Continued

appeal file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits.

Appeals of Cen-Vi-Ro of Texas, Inc.,
IBCA-718-5-68 and IBCA-755-12-68
(May 28, 1970) 77 I. D. 106

Termination for Convenience

Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs.

Appeal of Franklin W. Peters and Associates,
IBCA-762-1-69 (Dec. 28, 1970) 77 I. D. 213

FORMATION AND VALIDITY

Construction Contracts

Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee reexamined unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee.

Appeal of Franklin W. Peters and Associates,
IBCA-762-1-69 (Dec. 28, 1970) 77 I. D. 213

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Cost-Type Contracts

Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

Merger of Preliminary Agreements

A motion for reconsideration will be denied where it presents no evidence not previously available, nor any citations to controlling law which would require a different decision from that given, but which argues simply that the Board was wrong in its application of the law to the facts, and in its interpretation of the contract.

Appeal of Inter*Helo, Inc., IBCA-713-5-68 (Apr. 24, 1970)

Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so.

Appeal of Franklin W. Peters and Associates, IBCA-762-1-69 (Dec. 28, 1970) 77 I.D. 213

CONTRACTS--Continued

PERFORMANCE OR DEFAULT

Acceleration

A written order to the contractor to complete work by the date fixed in the contract for completion is an order to accelerate constituting a change when at the time of issuance the contractor was admittedly entitled to extensions of time which had been requested but not yet granted, and the contractor in fact accelerates. The contractor is entitled to an equitable adjustment for the increased costs due to the accelerated effort.

Appeal of L. O. Brayton & Company, IBCA-641-5-67 (Oct. 16, 1970) 77 I.D. 187

Excusable Delays

The Board sustains the propriety of a termination for default in a case where the termination notice was issued after the scheduled time for performance had passed and where the appellant failed to support its various allegations of excusable delays, changes and changed conditions.

Appeal of Service Construction Corporation, IBCA-678-10-69 (Jan. 12, 1970)

Where there is a conflict between drawings, and the evidence shows that the conflict was not obvious or patent, a contractor is entitled to an equitable adjustment for the additional expense attributable to the Government's design and coordination failures and to an appropriate time extension.

Appeal of L. J. Robinson, Inc., IBCA-772-4-69 (Feb. 25, 1970) 77 I.D. 22

Under a contract providing for the assessment of liquidated damages for delayed performance, the Board finds that the contractor was excusably delayed by reason of unusually severe weather and other causes and that in the special circumstances shown to be present the date for commencing performance had been improperly calculated to be the day after the date of receipt of the notice to proceed.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

Upon the basis of the entire record, including evidence introduced at a hearing, the Board determined that appellant was entitled to an extension of performance time of seven days because of unusually severe weather.

The contractor has the burden of proving an excusable cause of delay and the extent to which performance was thereby delayed. Where appellant proved an excusable cause, but did not establish that it was thereby delayed, the Board denied contractor's claim for an extension of time.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 1970)

A contractor is entitled to an extension of time under the Termination for Default-Damages for Delay-Time Extensions provision of the contract for delay caused by the Government in changing the materials requirements for a fence by a change in design, and for the delay caused by attempting to secure special bolts specified by the Government but which were in fact unobtainable from any source.

Appeal of Herman H. Neumann Construction Company, IBCA-761-1-69 (Oct. 16, 1970)

A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not per se a basis for excusable delay. While under the rule of Schweigert v. United States, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

Where the Government admitted that rainfall 50 percent or more above normal occurred during certain months, but the contractor's evidence indicated that normal rainfall would also stop the work and did not distinguish between delays caused by normal and abnormal rainfall, its claim for excusable delay based on unusually severe weather was denied. A claim of excusable delay based on the operation of the priorities system under the Defense Production Act was granted.

Appeal of Fulton Shipyard, IBCA-735-10-68 (Dec. 29, 1970)

Impossibility of Performance

Where the Government acknowledged that a specification requirement for driving piles within a 2-inch tolerance could not be met, the Board determined that the deficient and misleading specification resulted in the contractor doing additional work in the pulling, twisting and aligning of the piles to make it possible to fasten glue lam beams, for which the contractor was entitled to an equitable adjustment as a constructive change. A claim for additional work involved in installation of floors, walls and roof to accommodate the piles was denied, however, on the grounds that the contractor had failed to show (i) that the piles used were unsuitable for the job, or (ii) that, insofar as such work was concerned, he had been misled in any way by the specifications.

Appeal of Herman H. Neumann, IBCA-682-11-67 (Apr. 3, 1970)

Inspection

The Government is allowed a reasonable time within which to make an inspection.

Appeal of Herman H. Neumann Construction Company, IBCA-761-1-69 (Oct. 16, 1970)

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Substantial Performance

The Board determined that a project involving the construction of two swimming pools and bathhouses had been substantially completed at dates earlier than those determined by the contracting officer where the evidence established that the project was 98 percent complete and was capable of serving its intended purpose.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 1970)

Suspension of Work

When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay.

Appeal of L. O. Brayton & Company, IBLA 641-5-67 (Oct. 16, 1970)

CONVEYANCES

GENERALLY

Under the act of October 23, 1962, the Secretary of the Interior can convey an interest in land under the administrative jurisdiction of the Forest Service to a "qualified Applicant" only with the consent of the head of the administering agency, and where it is determined that an applicant for the conveyance of such land is not a "qualified applicant," the Secretary lacks authority to consider an application for the conveyance of any interest in the land.

Charles H. and Bernice I. Waugaman, A-31071 (Jan. 16, 1970)

DESERT LAND ENTRY

CLASSIFICATION

An agricultural use application for lands in Imperial Valley, California which would require the use of Colorado River water must be rejected under the rule enunciated in the Ritter-Bunn decision of 1965 (72 I.D. 111).

Mary Garewall Gill, Los Angeles 0134981 (Nov. 13, 1970)

DESERT LAND ENTRY--Continued

EXTENSION OF TIME

An application for an extention of time to submit final proof of the reclamation and cultivation of the land in a desert land entry is properly rejected where the entryman does not show that his failure to reclaim the land in his entry within the statutory life of his entry was due, without fault on his part, to unavoidable delay in the construction of irrigating works intended to convey water to the entered land, but where it appears, rather, that the failure was the result either of lack of diligence in carrying to their completion the required acts of reclamation and cultivation or lack of foresight in anticipating the burden of performing those acts.

Calvin L. Howard, Jenadean Howard, A-31060 (Mar. 17, 1970)

An extension of time to submit final proof of the reclamation and cultivation of the land in a desert land entry may be granted upon a satisfactory showing that the entryman's failure to reclaim the land within the statutory life of the entry was due, without fault on his part, to unavoidable delay in the construction of irrigation works intended to convey water to the entered land; to the extent that the failure to achieve timely reclamation of the land is attributable to financial reverses suffered by entryman subsequent to allowance of his entry and to unforeseeable delay, unrelated to any act of the entryman, in obtaining necessary irrigation equipment, the delay will be recognized as having been unavoidable.

Marjorie P. Newcomb, IBLA 70-21 (Dec. 29, 1970)

EQUITABLE ADJUDICATION

SUBSTANTIAL COMPLIANCE

The equitable adjudication authority of the Secretary of the Interior does not extend to the validating and patenting of a placer mining claim located on land included in a powersite classification since there cannot be substantial compliance with the mining laws in the case of claims located on land withdrawn from mining location.

Pacific Coast Gasoline Company, A-31120 (Apr. 17, 1970)

EXCHANGES OF LANDS

(See also Indian Lands and Private Exchanges)

FOREST EXCHANGES

A forest lieu selection right is extinguished when the base lands are reconveyed by the United States to the principal. The purported agent or assignee of the principal has no rights thereafter against the United States even if he recorded his power of attorney and other selection documents prior to the reconveyance.

Richard M. Lade, As Attorney in Fact for C. W. Clarke Company, IBLA 70-4 (Dec. 29, 1970)

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

GENERALLY

The Board of Mine Operations Appeals has not been delegated general supervisory authority over the entire spectrum of the Bureau's various enforcement responsibilities. The Secretary's delegation to the Board was intended primarily to create an independent adjudicatory forum for review of proceedings initiated, not by the Board, but by an appropriate interested party or by the Bureau.

Freeman Coal Mining Corporation, Vinc. 70-145, Vinc. 70-146 (Oct. 5, 1970) 77 I. D. 149

APPEALS

A determination by the Bureau of Mines that an operator has totally abated an alleged violation of a mandatory health or safety standard is not reviewable by the Board of Mine Operations Appeals.

A document issued by the Bureau of Mines to an operator finding a violation of a mandatory health or safety standard constitutes a notice subject to review by the Board of Mine Operations Appeals. Such a document is a reviewable notice whether or not it contains a requirement that the operator abate the alleged violation within a definite time.

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 Continued

APPEALS--Continued

In an unusual case, the meaning and effect of notices issued under section 104 (b) was not sufficiently clear to permit the parties entitled to seek review thereof to fairly exercise that right. Consequently, the 30-day statutory period for filing applications for review did not begin to run until the Bureau of Mines clarified the notices by stating its position as to their meaning and effect.

On review of a notice of violation issued pursuant to section 104 (b), the scope of review does not include issues which bear solely on facts required to be found by the Bureau of Mines to issue a notice under section 104 (h).

The Board of Mine Operations Appeals may dismiss an application for review of a notice or order, with or without leave to submit an amended application, if the application fails to comply with the statute, with the Board's rules, or with an order of the Board or an Examiner.

The Board of Mine Operations Appeals may dismiss an application for review of a notice or an order where the applicant fails to present evidence sufficient to support findings of fact in his favor.

An applicant for review of a notice or order should be permitted to withdraw his application at any time.

Freeman Coal Mining Corporation, Vinc. 70-145, Vinc. 70-146 (Oct. 5, 1970) 77 I. D. 149

FINDINGS, NOTICES AND ORDERS

Section 104 (a) of the Act requires the Bureau of Mines to issue an immediate order of withdrawal upon a finding of imminent danger, whether or not equipment necessary to abate the condition causing such danger is available to the operator.

Where a condition which may lead to imminent danger exists, the Board of Mine Operations Appeals, in a proceeding under section 104 (h) of the Act, may issue an order requiring withdrawal of miners, after public hearing, whether or not equipment necessary to abate the condition exists; but an order of withdrawal is not required as in the case of section 104 (a).

Safety of miners is always a relevant consideration in determining a reasonable time for abatement of violations of mandatory standards. Other relevant considerations include the fact of violation

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 Continued

FINDINGS, NOTICES AND ORDERS--Continued

and the availability of equipment. In certain circumstances, difficulty of abatement may be a relevant consideration.

Freeman Coal Mining Corporation, Vinc. 70-145, Vinc. 70-146 (Oct. 5, 1970) 77 I. D. 149

FEDERAL EMPLOYEES AND OFFICERS

GENERALLY

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

Authority of the Bureau of Indian Affairs to Transfer To An Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R.S. Sec. 2072, 25 U.S.C. Sec. 48, M-36803 (Apr. 3, 1970) 77 I. D. 49

APPOINTMENT

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970) 77 I. D. 49

FEDERAL EMPLOYEES AND OFFICERS--Continued

DISCIPLINARY ACTION

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970)
77 I. D. 49

PROMOTION

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970)
77 I. D. 49

QUALIFICATIONS

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the

FEDERAL EMPLOYEES AND OFFICERS--Continued

QUALIFICATIONS--Continued

provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970)
77 I. D. 49

SEPARATION

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970)
77 I. D. 49

TENURE

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the

FEDERAL EMPLOYEES AND OFFICERS--Continued

TENURE--Continued

provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To an Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R. S. Sec. 2072, 25 U.S.C. sec. 48, M-36803 (Apr. 3, 1970) 77 I.D. 49

GRAZING LEASES

GENERALLY

A grazing lease creates a property right which may be used to secure a debt of the lessee.

Robert M. Taylor, Transamerica Title Insurance Company, IBLA 70-24 (Dec. 9, 1970)

APPLICATIONS

An application for a grazing lease for land already under lease is properly rejected where no grounds are established for cancellation of the outstanding lease.

Robert M. Taylor, Transamerica Title Insurance Company, IBLA 70-24 (Dec. 9, 1970)

GRAZING LEASES--Continued

APPORTIONMENT OF LAND

A division of lands for leasing purposes among preference-right applicants on an equal plane of preference will not be disturbed where a review of all factors involved indicates that the division is equitable.

Thomas W. Dixon et al., IBLA-70-52 (Dec. 30, 1970)

PREFERENCE RIGHT APPLICANTS

Where land is awarded to one of two competing applicants for a section 15 grazing lease on the ground that he is the only qualified preference applicant for the land and the other applicant appeals, the case becomes moot when the period for which the lease would have been issued expires and a determination as to further leasing must be made upon the conditions then existing.

Fred Milliman, A-31107 (Mar. 30, 1970)

A division of lands for leasing purposes among preference-right applicants on an equal plane of preference will not be disturbed where a review of all factors involved indicates that the division is equitable.

Thomas W. Dixon et al., IBLA-70-52 (Dec. 30, 1970)

GRAZING PERMITS AND LICENSES

BASE PROPERTY (LAND)

Generally

Where the long-term forage production potential of a grazing allotment is less than the base property qualifications of the sole user of the allotment, it is proper to reduce the qualifications of the user to the forage production potential as provided by 43 CFR 4111.4-3 (b) and (c).

Preston Nutter Corporation, A-31103 (Mar. 16, 1970)

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION AND REDUCTIONS

Where the long-term forage production potential of a grazing allotment is less than the base property qualifications of the sole user of the allotment, it is proper to reduce the qualifications of the user to the forage production potential as provided by 43 CFR 4111.4-3 (b)and (c).

Preston Nutter Corporation, A-31103 (Mar. 16, 1970)

HOMESTEADS (ORDINARY)

CANCELLATION OF ENTRY

The Department does not have authority to extend the 5-year life of a homestead entry to permit the entryman to construct a habitable house on it after the expiration of the 5-year period and an entry will be canceled if the entryman concedes that the requirement was not met during the 5-year life of the entry.

Mrs. Harril Berry, A-31108 (Apr. 1, 1970)

CLASSIFICATION

An application for a homestead entry for land in a national forest must be rejected in the absence of any authority in the Secretary of the Interior to permit such a disposition.

August H. Snyder, IBLA 70-66 (Nov. 30, 1970)

CULTIVATION

Where the cultivation attempted on muskeg land in Alaska consisted of disking and seeding, without removal of the natural vegetative cover, and it appears that the disking resulted only in the slicing of the vegetative mat without breaking of the underlying soil, the cultivation requirements of the homestead law have not been satisfied, and, to the extent to which it shows such cultivation, homestead final proof is properly rejected.

HOMESTEADS (ORDINARY)--Continued

CULTIVATION--Continued

The breaking, planting or seeding and tillage for a crop which constitute cultivation of the soil of a homestead entry must include such acts and be done in such manner as to be reasonably calculated to produce profitable results; where it appears that land has been disked and seeded in the same manner as the land in other homestead entries in the area which have gone to patent, and where it is not established that such disking and seeding is not acceptable practice for the type of land involved in that area, the entryman's acts may be found to have been calculated to produce profitable results notwithstanding his failure to produce a useful crop.

United States v. Dale Gladys Garrett, A-31064 (May 28, 1970)

Homestead final proof showing that less than one-eighth of the entry was cultivated during the fifth entry year is defective on its face and is subject to rejection unless a reduction in the cultivation requirement for that year is warranted, or unless the entryman relinquishes sufficient acreage so that the amount cultivated constitutes one-eighth of the entry.

The cultivation requirements for one year of a homestead entry may be reduced where the entryman suffers some misfortune making him unable to cultivate that year. Unusual weather conditions preventing him from cultivating that year as compared with other years when he did cultivate may be considered a misfortune. An entryman's misunderstanding of the requirements in regulations will not constitute a misfortune.

Action rejecting homestead final proof may be suspended to permit a homestead entryman to make a further showing of a misfortune which may have prevented him from cultivating the required amount of acreage for the fifth year of his homestead entry.

Robert W. Blondeau, IBLA-70-32 (Sept. 22, 1970)

HOMESTEADS (ORDINARY)--Continued

FINAL PROOF

Where the cultivation attempted on muskeg land in Alaska consisted of disking and seeding, without removal of the natural vegetative cover, and it appears that the disking resulted only in the slicing of the vegetative mat without breaking of the underlying soil, the cultivation requirements of the homestead law have not been satisfied, and to the extent to which it shows such cultivation, homestead final proof is properly rejected.

The breaking, planting or seeding and tillage for a crop which constitute cultivation of the soil of a homestead entry must include such acts and be done in such manner as to be reasonably calculated to produce profitable results; where it appears that land has been disked and seeded in the same manner as the land in other homestead entries in the area which have gone to patent, and where it is not established that such disking and seeding is not acceptable practice for the type of land involved in that area, the entryman's acts may be found to have been calculated to produce profitable results notwithstanding his failure to produce a useful crop.

A homestead entryman who cultivates a portion of the required area of his entry in compliance with the cultivation requirements of the homestead law may receive patent to a proportionate part of the land in his entry upon his relinquishment of the balance of the land embraced in the entry.

United States v. Dale Gladys Garrett, A-31064 (May 28, 1970)

Homestead final proof showing that less than one-eighth of the entry was cultivated during the fifth entry year is defective on its face and is subject to rejection unless a reduction in the cultivation requirement for that year is warranted, or unless the entryman relinquishes sufficient acreage so that the amount cultivated constitutes one-eighth of the entry.

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Robert W. Blondeau, IBLA-70-32 (Sept. 22, 1970)

HOMESTEADS (ORDINARY)--Continued

HABITABLE HOUSE

The Department does not have authority to extend the 5-year life of a homestead entry to permit the entryman to construct a habitable house on it after the expiration of the 5-year period and an entry will be canceled if the entryman concedes that the requirement was not met during the 5-year life of the entry.

Mrs. Harril Berry, A-31108 (Apr. 1, 1970)

LANDS SUBJECT TO

An application for a homestead entry for land in a national forest must be rejected in the absence of any authority in the Secretary of the Interior to permit such a disposition.

August H. Snyder, IBLA 70-66 (Nov. 30, 1970)

MILITARY SERVICE

Where the record in a reclamation homestead contest contains allegations but no evidence that the original entryman performed military service which may be applied by his heir, the present entryman, in satisfaction of a year's cultivation under the homestead and reclamation laws, which the contest charges that the heir has not performed properly, the case will be remanded for submission of evidence as to the original entryman's military service and its effect upon the issues raised by the complaint.

David H. Evans v. Ralph C. Little, A-31044 (Apr. 10, 1970)

PREFERENCE RIGHTS

Since a withdrawal made by Public Land Order 4582 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not

HOMESTEADS (ORDINARY)--Continued

PREFERENCE RIGHTS--Continued

been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

Louis J. Hobbs, A-31051 (Jan. 15, 1970)
77 I.D. 5

RELINQUISHMENT

A homestead entryman who cultivates a portion of the required area of his entry in compliance with the cultivation requirements of the homestead law may receive patent to a proportionate part of the land in his entry upon his relinquishment of the balance of the land embraced in the entry.

United States v. Dale Gladys Garrett, A-31064 (May 28, 1970)

Homestead final proof showing that less than one-eighth of the entry was cultivated during the fifth entry year is defective on its face and is subject to rejection unless a reduction in the cultivation requirement for that year is warranted, or unless the entryman relinquishes sufficient acreage so that the amount cultivated constitutes one-eighth of the entry.

Robert W. Blondeau, IBLA-70-32 (Sept. 22, 1970)

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

GENERALLY

An application for an Indian allotment within a national forest under sec. 31 of the act of June 25, 1910, is properly rejected where the Department of Agriculture has determined that the land is more valuable for timber than for Agricultural and grazing purposes.

Ross A. Neugin, A-31086 (Feb. 2, 1970)

INDIAN ECONOMIC ENTERPRISES

GENERALLY

Unauthorized use of government trademark registered by Indian Arts and Crafts Board is illegal and is subject to criminal and civil sanctions under 18 U.S.C. 1158 and 15 U.S.C. 1116 and 1117.

Indian Arts and Crafts Board Trademark, M-36798 (Jan. 6, 1970) 77 I.D. 4

INDIAN LANDS
(See also Indian Probate)

GENERALLY

The general rule governing changes in reservation boundaries is that when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress; no authority exists for an administrative change in reservation boundaries. Whether Congress intended to change a reservation boundary by an act would be reflected primarily by the act itself and its legislative history. Sale of land within the boundaries of the Fort Berthold Indian Reservation pursuant to Congressional authority did not change the boundaries nor remove the land from reservationstatus.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

ALLOTMENTS

Alienation

State statutes relating to partition of real property are not applicable to lands in which interests are owned by Indians subject to restraints on alienation imposed by federal statutes unless such federal statutes authorize application of such state statutes to such lands. Therefore, the laws relating to such lands in Oklahoma were not altered by

INDIAN LANDS--Continued

ALLOTMENTS--Continued

Alienation--Continued

the enactment, on March 2, 1970, of an amendment, ch. 40 (H. B. No. 1609), /1970/ Okla. laws 43, to Okla. Stat. tit. 12, Section 1501 (1961).

Effect of Recent Amendment to Oklahoma Partition Statutes on Lands in Which Undivided Interests are Owned By Indians in Trust or Restricted Status, Pursuant to Federal Statutes, M-36806 (June 3, 1970)

DESCENT AND DISTRIBUTION

Generally

Where an heir has been erroneously omitted from an estate, and the three (3) year limitation has passed, the Secretary nonetheless has the power to reopen and remand the matter for further proceedings.

Estate of Fred Kearney, IA-S-4 (Jan. 26, 1970)

The Secretary has the power to waive his own regulations, and reopen an otherwise final probate determination, where it appears that an heir was inadvertently omitted from sharing in the estate, and the estate remains in a trust status, under the jurisdiction of the Secretary.

Estate of Dorothy Arnett, IA-S-5 (May 28, 1970)

When an Indian dies leaving a will made pursuant to 25 U. S. C. 373, which meets Secretarial approval, State laws pertaining to dower or curtesy rights are not applicable and do not affect the manner in which he devises his trust property.

When the Board of Indian Appeals determines that the legal interpretation of a probate case is correct and that the case has been properly conducted, decided and reviewed, its decision is the final decision of the Department.

Estate of John J. Akers, IBIA 70-4 (Sept. 9, 1970) 77 I. D. 268

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Generally--Continued

Official notice of documents and records will not be taken unless they be introduced in evidence or unless an order or stipulation provides to the contrary.

Mere objection to the technique of recording and transcribing testimony cannot be a ground for rehearing unless reversible error is specified.

Estate of Julius Benter, IBLA 70-5 (Nov. 17, 1970)

The "law of the case" doctrine is as applicable to proceedings before trial and appellate administrative tribunals as it is to proceedings before trial and appellate courts, in cases where the ingredients comprising the elements of the doctrine are present. This doctrine holds that a decision on a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court, or on a later appeal in the appellate court, unless the evidence in a subsequent trial is substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

When, upon review of the proceedings in the probate of an Indian will, the Board of Indian Appeals determines that the findings of the Examiner of Inheritance and his application of the law are correct, and that the proceedings in all other respects were properly conducted, the decision of the Board affirming the decision of the Examiner is the final decision of the Department of the Interior.

Estate of Richard Lucero, IBIA-71-3 (Dec. 28, 1970)

Although 25 CFR 15 does not include any provision for rehearing after decision on appeal, the Board has inherent power to rectify manifest error.

A rehearing after entry of a decision on appeal will not be granted except upon a showing of manifest error in such decision.

Estate of George Minkey, IBIA-70-2 (Supp.) (Dec. 29, 1970)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Claims Against Estates

A decedent's promise to give land to a claimant in return for care and support cannot be construed as compensation within the meaning of the term in 25 C.F.R. sec. 15.23 (d) which provides that:

"Claims for care will not receive favorable consideration unless clear and convincing proof is offered showing that the care was given on a promise of compensation and that compensation was expected."

The Hearing Examiner is not required to allow the claim of a close relative and one of the heirs for the care and support of the decedent merely because the remaining heirs interpose no objection to the allowance of a claim at the time of the hearing or during any other stage of the probate of an estate. Rather he is required to examine the merits of all claims to determine their validity prior to the decision to allow or disallow claims against the decedent's estate.

Estate of Maggie Spottedwolf, IA-D-35
(Apr. 16, 1970)

Intestate Succession

The Hearing Examiner does not have authority pursuant to the Act of June 25, 1910, 25 U.S.C. 372 to determine the heirs of the decedent on the basis of waiver or agreement. Therefore an Assignment of their interests in the estate executed by two of four heirs cannot be considered by the Hearing Examiner.

Estate of Maggie Spottedwolf, IA-D-35
(Apr. 16, 1970)

Wills

The findings and conclusions of the Examiner of Inheritance regarding the testamentary capacity of the testator will not be set aside where they are supported by credible evidence.

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

Evidence which shows that the testator was in a weakened physical and mental condition, that a confidential relationship existed between the testator and beneficiary of the will, and that the beneficiary was active in the preparation of the will raises a presumption of undue influence which the beneficiary must rebut.

Estate of Louis Leo Isadore, IA-P-21
(Feb. 12, 1970)

To invalidate a will because of undue influence having been imposed upon the decedent it is necessary to show: (1) That the decedent was susceptible to being dominated by another; (2) that the person allegedly influencing the decedent in the execution of such will was capable of controlling the mind and actions of the decedent; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce the decedent to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Statements made prior to a decedent's marriage regarding disposition of his estate are not sufficient to show that a subsequent will devising his estate to his surviving spouse was executed by mistake.

Estate of Louis B. Fronkier, IA-T-24
(Feb. 24, 1970)

The Department of Interior does not approve holographic wills. Neither has the Department of Interior approved contracts to make wills.

Estate of Maggie Spottedwolf, IA-D-35
(Apr. 16, 1970)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

The requisite mental capacity which a testator must have in order to make a valid testamentary disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself.

The bare allegation that a will is unnatural because of the relatively small devise to the heirs of the testator is insufficient to support a finding that such will is unnatural.

A will wherein the testator disinherits his heirs and blood relatives is not unnatural per se. The preference of strangers to the blood by a testator is merely evidence to be considered in the determination of his testamentary capacity, and whether such preference is natural depends on the relationship between the testator and his heirs and devisees.

Medical evidence regarding the testamentary capacity of a testator which is inconclusive and subject to a reasonable difference of opinion is not sufficient to overcome the presumption of testamentary capacity created by the testimony of the attesting witnesses that the testator's will was duly and properly executed.

After a will of a deceased Osage Indian has been given Secretarial approval, no affirmative action toward approval or disapproval of earlier wills will be necessary or appropriate unless admission of the approved will to probate is denied, in which event such action will be taken after the parties have been given an opportunity to present evidence on the validity of the will or wills then to be considered.

Estate of John P. Whitetail, IA-T-23 (Apr. 17, 1970)

Undue influence is not to be presumed where the evidence affirmatively discloses that a beneficiary of a will who accompanied the testator to the offices of the scrivener was not present when the terms of the will were discussed or when the will was executed.

A will wherein the testator disinherits his heirs and blood relatives is not unnatural per se. The preference of strangers to the blood by a testator is merely evidence to be considered in the determination of his testamentary capacity, and whether such preference is natural depends on the relationship between the testator and his heirs and devisees.

Estate of Otto Littleman (Lame Woman), IA-T-25 (June 5, 1970)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

When a decision of the Secretary of the Interior disapproving the will of a deceased Indian is challenged in the courts, and the final judgment directs that the will be approved, the Secretary will rescind his previous decision and approve the will.

Estate George Chahsenah, IA-T-4 (Supp.) (June 30, 1970)

A state law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills.

A state law providing that a child shall take as if the parent died intestate if the child is not named or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. 373.

Estate of Loretta Pederson, IBIA 70-1 (Oct. 6, 1970) 77 I.D., 270

When the evidence shows that the legally appointed guardian of the testator actively participated in procuring the execution of a will naming the guardian as a principal beneficiary, a rebuttable presumption of undue influence is raised. The burden of rebutting such a presumption then falls upon the proponent of the will.

Estate of Julius Benter, IBLA 70-5 (Nov. 17, 1970)

Where the evidence in a hearing record clearly shows that the proponents have established a prima facie case of the validity of a will and the contestants have shown only opportunity for undue influence without presenting any evidence of the exercise of undue influence and failed to establish testamentary incapacity of the testator at the time of execution, the finding of validity of the will by the Examiner of Inheritance will be upheld on appeal.

Estate of Richard Lucero, IBIA-71-3 (Dec. 28, 1970)

INDIAN LANDS--Continued

FEE LANDS

The general rule governing changes in reservation boundaries is that when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress; no authority exists for an administrative change in reservation boundaries. Whether Congress intended to change a reservation boundary by an act would be reflected primarily by the act itself and its legislative history. Sale of land within the boundaries of the Fort Berthold Indian Reservation pursuant to Congressional authority did not change the boundaries nor remove the land from reservationstatus.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

INDIAN PROBATE

APPEAL

Timely Filing

Unless there are compelling reasons shown, the Board of Indian Appeals will not depart from its rule requiring strict compliance with regulations governing the timely filing of appeals.

Estate of George Minkey, IBIA-70-2 (Aug. 13, 1970)

REOPENING

Generally

A petition to reopen will be denied when it is filed more than three years after the final heirship determination was made and the petitioner was under no apparent disability due to minority or lack of competency at the time of the hearing or during the three year period.

Estate of George Minkey, IBIA-70-2 (Aug. 13, 1970)

INDIAN PROBATE--Continued

REOPENING--Continued

Waiver of Time Limitation

A petition to reopen on the grounds of lack of notice, filed more than three years after the entry of the order determining heirs, will not be granted unless there is compelling proof that the delay was not occasioned by the petitioner's lack of diligence.

Estate of George Minkey, IBIA-70-2 (Aug. 13, 1970)

INDIAN TRIBES

GENERALLY

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To An Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R.S. Sec. 2072, 25 U.S.C. Sec. 48, M-36803 (Apr. 3, 1970) 77 I.D. 49

INDIAN TRIBES--Continued

GENERALLY--Continued

Indian tribes generally do not possess criminal jurisdiction over Non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over Non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

Criminal Jurisdiction of Indian Tribes Over Non-Indians, M-36810 (August 10, 1970) 77 I.D. 113

ENROLLMENT

The enrollment actions of a tribal enrollment committee and a tribal council, acting under a duly adopted and approved tribal constitution that does not provide for review by the Secretary, and in the absence of an applicable act of Congress, are final insofar as they relate solely to tribal questions.

Appeal by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, in the Matter Of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, IA-1972-X-9 (Aug. 25, 1970) 77 I.D. 116

ENROLLMENT APPEALS

Once a tribal council acts to deny a person's application for enrollment, and there is no provision in the tribal constitution or in an applicable act of Congress for appeal of that determination to the Secretary, there exists jurisdiction in the Secretary to review only the effect of the council's action on the distribution of tribal assets over which the Secretary has been granted au-

Appeal by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, in the Matter Of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, IA-1972-X-9 (Aug. 25, 1970) 77 I.D. 116

INDIAN TRIBES--Continued

JUDGMENT FUNDS

When a tribe receives separate loans for expert assistance on several claims against the United States, repayment from an award on a claim is only required to the extent needed to repay the loan made for expert assistance on the particular claim on which the award was granted.

Under the Appropriation Act for the Department of the Interior for fiscal 1970, 83 Stat. 147, there may be paid out of an award of the Indian Claims Commission only the attorney fees and expenses of litigation incurred in obtaining the award, plus expenses for program planning, until other legislation authorizes other use of the award.

Repayment of Expert Assistance Loans, M-36800 (Feb. 20, 1970) 77 I.D. 20

OKLAHOMA TRIBES

State statutes relating to partition of real property are not applicable to lands in which interests are owned by Indians subject to restraints on alienation imposed by federal statutes unless such federal statutes authorize application of such state statutes to such lands. Therefore, the laws relating to such lands in Oklahoma were not altered by the enactment, on March 2, 1970, of an amendment, ch. 40 (H. B. No. 1609), /1970/ Okla. laws 43, to Okla. Stat. tit. 12, Section 1501 (1961).

Effect of Recent Amendment to Oklahoma Partition Statutes on Lands in Which Undivided Interests are Owned By Indians in Trust or Restricted Status, Pursuant to Federal Statutes, M-36806 (June 3, 1970)

INDIANS

CRIMINAL JURISDICTION

Indian tribes generally do not possess criminal jurisdiction over Non-Indians unless there still remains in force a treaty provision whereby a

INDIANS--Continued

CRIMINAL JURISDICTION--Continued

tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over Non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

Criminal Jurisdiction of Indian Tribes Over Non-Indians, M-36810 (August 10, 1970) 77 I.D. 113

LAW AND ORDER

Indian tribes generally do not possess criminal jurisdiction over Non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over Non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

Criminal Jurisdiction of Indian Tribes Over Non-Indians, M-36810 (August 10, 1970) 77 I.D. 113

PROBATE

To invalidate a will because of undue influence having been imposed upon the decedent it is necessary to show: (1) That the decedent was susceptible to being dominated by another; (2) that the person allegedly influencing the decedent in the execution of such will was capable of controlling the mind and actions of the decedent; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce the decedent to make a will contrary to his own

INDIANS--Continued

PROBATE--Continued

desires; and (4) that the will is contrary to the decedent's own desires.

Statements made prior to a decedent's marriage regarding disposition of his estate are not sufficient to show that a subsequent will devising his estate to his surviving spouse was executed by mistake.

Estate of Louis B. Fronkier, IA-T-24 (Feb. 24, 1970)

It is within the sound discretion of the Hearing Examiner whether to continue a hearing, and the decision of the Hearing Examiner will not be disturbed except upon a clear showing of abuse of discretion. The deliberate and unexplained absence of a claimant's retained counsel is not a ground for continuance of a hearing, and the decision of the Hearing Examiner to proceed with rather than to continue the hearing until the claimant's counsel was present, where no continuance was requested, is not an abuse of discretion which would deprive claimant of a full and fair hearing, particularly where nothing presented in support of the appeal would result in a different decision.

Estate of Maggie Spottedwolf, IA-D-35 (Apr. 16, 1970)

The requisite mental capacity which a testator must have in order to make a valid testamentary disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself.

The bare allegation that a will is unnatural because of the relatively small devise to the heirs of the testator is insufficient to support a finding that such will is unnatural.

A will wherein the testator disinherits his heirs and blood relatives is not unnatural per se. The preference of strangers to the blood by a testator is merely evidence to be considered in the determination of his testamentary capacity, and whether such preference is natural depends on the relationship between the testator and his heirs and devisees.

INDIANS--Continued

PROBATE--Continued

Medical evidence regarding the testamentary capacity of a testator which is inconclusive and subject to a reasonable difference of opinion is not sufficient to overcome the presumption of testamentary capacity created by the testimony of the attesting witnesses that the testator's will was duly and properly executed.

After a will of a deceased Osage Indian has been given Secretarial approval, no affirmative action toward approval or disapproval of earlier wills will be necessary or appropriate unless admission of the approved will to probate is denied, in which event such action will be taken after the parties have been given an opportunity to present evidence on the validity of the will or wills then to be considered.

Estate of John P. Whitetail, IA-T-23 (Apr. 17, 1970)

Undue influence is not to be presumed where the evidence affirmatively discloses that a beneficiary of a will who accompanied the testator to the offices of the scrivener was not present when the terms of the will were discussed or when the will was executed.

A will wherein the testator disinherits his heirs and blood relatives is not unnatural per se. The preference of strangers to the blood by a testator is merely evidence to be considered in the determination of his testamentary capacity, and whether such preference is natural depends on the relationship between the testator and his heirs and devisees.

The Hearing Examiner in proceedings conducted pursuant to 25 CFR 15.0-15.34 has neither the duty nor the authority to appoint or otherwise secure the services of an attorney for an interested party.

Estate of Otto Littleman (Lame Woman), IA-T-25 (June 5, 1970)

When a decision of the Secretary of the Interior disapproving the will of a deceased Indian is challenged in the courts, and the final judgment directs that the will be approved, the Secretary will rescind his previous decision and approve the will.

Estate of George Chahsenah, IA-T-4 (Supp.) (June 30, 1970)

INVENTIONS

Rights to an employee invention are determined by Department's Patent Regulations, Subpart A, section 6.5.

Regulations provide that Government obtains ownership if invention (a) made during work hours, or (b) made with contribution by Government, or (c) bears direct relation to or is made in consequence of inventor's official duties.

Inventor is entitled to retain ownership because present invention of a combination reverse osmosis-distillation system was made on his own time with no contribution by the Government, and is not deemed to bear a direct relation to or have been made in consequence of his employment which employment in no way requires participation in R&D.

Rights to Invention Made By Employee, M-36816 (Nov. 25, 1970)

MINERAL LANDS

PROSPECTING PERMITS

An applicant for a fractional interest uranium prospecting permit is required by regulation to own, or have operating rights to, at least a portion of the mineral interest which is not owned by the United States as a condition to securing a permit.

Jack J. Grynberg, A-31132 (Apr. 1, 1970)

A charge of official discrimination against an applicant for coal prospecting permits, based upon an allegation that other lands known to be valuable for coal have been awarded to certain other permit applicants in the past, is not a proper basis for issuing this applicant coal prospecting permits for lands known to contain workable coal deposits.

George Brennan, Jr., IBLA-70-107 (Sept. 22, 1970)

MINERAL LANDS--Continued

PROSPECTING PERMITS--Continued

An application for a present fractional interest hardrock prospecting permit for lands in a national forest filed under Reorganization Plan No. 3 of 1946 is properly rejected as to land in which the United States does not acquire any mineral interest until 1985.

Lloyd K. Johnson, IBLA 70-333 (Oct 12, 1970)

MINERAL LEASING ACT

GENERALLY

A lessee of an oil and gas lease issued under section 17 of the Mineral Leasing Act, as amended, is not entitled to extract or mine oil shale, native asphalt, and bituminous substance subject to section 21 of the Mineral Leasing Act, and is not entitled to any refund of rentals upon the basis of an impairment of contractual rights or to the issuance of new leases giving such rights.

Duncan Miller, A-31095 (Feb. 2, 1970)

MINING CLAIMS

GENERALLY

When there has been a severance of a mining claim, each part of the severed claim is independently subject to all the requirements of the mining law, without regard to the remainder of the claim, and a claimant of a severed portion must show a valid discovery within its limits, or that portion will be declared null and void.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

MINING CLAIMS--Continued

GENERALLY--Continued

Under the mining laws of the United States one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the locator must show that he has made a discovery of a valuable mineral deposit within the limits of the claim in order to retain his possession.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

ASSESSMENT WORK

Assessment work is required only to preserve the exclusive right to the possession of a valid mineral location on which discovery has been made, as against other locators, and is not a matter of concern to the United States; assessment work performed in connection with mining claims which are null and void ab initio will not cure the invalidity of such claims.

James W. Hansen et al., IBLA 70-208 (Dec. 2, 1970)

COMMON VARIETIES OF MINERALS

Mining claims located for deposits of decomposed granite and building stone are properly declared null and void where the evidence supports a finding that the deposits are common varieties of stone located after July 23, 1955.

The fact that a deposit of an otherwise common granite stone has a location closer to the market than others does not make it an "uncommon variety" as location is not a unique property

MINING CLAIMS-- Continued

COMMON VARIETIES OF MINERALS--Continued

inherent in the deposit but is only an extrinsic factor.

United States v. Bedrock Mining Co. et al., IBLA 70-27 (Sept. 23, 1970)

Mining claims located prior to July 23, 1955, for common varieties of building stone or sand and gravel are valid only if they meet all the requirements of the mining laws, including discovery, prior to that date

United States v. Silverton Mining and Milling Company, IBLA-70-22 (Sept. 23, 1970)

Even if deposits of sand suitable for use in glass manufacturing may be considered uncommon varieties within the meaning of the act of July 23, 1955, and locatable thereafter, there must still be a determination that the deposits constitute valuable mineral deposits under the mining laws by application of the prudent man test as implemented by the marketability test in order to validate the mining claims for such deposits.

Unites States v. Maurice Duval, et al., IBLA 70-18 (Nov. 23, 1970)

In order to satisfy the requirements for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where mining claimants fail to prove by a preponderance of the evidence that the materials from their claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally

Mining claims located for decomposed granite and building stone are properly declared null and void where the evidence supports a finding that the deposits of such materials are common varieties subject to the act of July 23, 1955, and the prudent man test of a discovery of a valuable mineral deposit, as complemented by the marketability test, was not satisfied as of that time.

United States v. Amos D. Robinette et al., A-31036 (Mar. 4, 1970)

The locatability after July 23, 1955, of a material under the trade name of decomposed granite, actually a decomposition of common gneiss rock, allegedly having special properties not found in ordinary sand and gravel making it cohesive and useful as a binder for lawn use and mixing with other substances primarily for sub-base construction purposes, is to be determined by whether it is a common variety of stone rather than a common variety of sand and gravel, and it is properly determined to be a common variety of stone where it appears that the material occurs extensively thoughout the area and elsewhere, and, where the material was not marketable prior to the act of July 23, 1955, there was not a valuable mineral deposit on mining claims for such material within the meaning of the mining laws necessary to validate the claims as of the date of the act, and the claims are properly declared null and void.

Building stone of common gneiss rock and limestone useful only for construction work for walls, chimneys, and the limestone possibly for roofing granules also, having no special and distinct properties for such purposes are common varieties subject to the act of July 23, 1955, removing such materials from location under the mining laws, and mining claims located for such stone prior thereto are properly held to be invalid for lack of discovery as of that date where at the most only nominal sales of the stone were made in 1947-1950 and little or no sales were made in the subsequent period until July 23, 1955.

United States v. Amos D. and Lena S. Robinette, A-31133 (Mar. 4, 1970)

Mining claims located prior to the act of July 23, 1955, allegedly valuable for deposits of decomposed granite and building stone are properly

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

declared null and void where the materials are not shown to have any special properties but are common varieties subject to the act, and were not marketable prior to that time because of access problems and the general lack of a demand which could not be met from other more economically feasible sources.

United States v. Evelyn T. Harding et al., A-31138 (Mar. 4, 1970)

Sand and gravel useful only for purposes for which other common varieties of sand and gravel may be used and having no unique properties giving them special and distinct value for such purposes are common varieties no longer locatable under the act of July 23, 1955.

The marketability of common varieties of sand, gravel or stone must be shown as of the date of the act of July 23, 1955, in order to sustain mining claims located for such materials prior to that time. The test does not require a showing that materials have actually been sold at a profit as of that time, but that they could have been; however, in an area such as the Las Vegas Valley where there are vast quantities of sand and gravel, the lack of sales from mining claims raises a presumption that a prudent man could not market the materials from the claims and the presumption is not overcome by theoretical and hypothetical evidence as to there being a general market for such materials.

United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (Mar. 27, 1970)

To satisfy the requirements for discovery on a placer claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that at most the material on the claim was suitable for commercial uses and theoretically could possibly have been marketed at a profit as of July 23, 1955, is insufficient to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

United States v. J. R. Osborne et al., A-31030 (May 26, 1970) 77 I. D. 83

There has been no discovery under the mining laws of a valuable deposit of silica and wollastonite where they are constituents of a quartzite building stone and cannot be economically mined, separated, and sold for other industrial or commercial purposes; and where the building stone of which they are a part has no unique property which gives it a special and distinct value for building stone above that of other common varieties of stone, mining claims for such material are subject to the act of July 23, 1955.

United States v. Clarence T Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Special Value

To determine whether a deposit of stone is a common variety of stone, there must be a comparison of the material found in that deposit with other similar-type minerals in order to ascertain whether the material has a property giving it a distinct and special value; where no basis is shown for distinguishing the material in the deposit from that found in other deposits of commonly occurring stone except that some material from the first deposit has been marketed, while none has been marketed from the other deposits, and where comparison with other materials which are used for the same purposes for which the material is allegedly valuable is not possible because those purposes are not adequately explained and other materials used for the same purposes are not identified, it is properly determined that the material in the particular deposit is a common variety of stone not subject to location under the mining laws of the United States after July 23, 1955.

United States v. Norman Rogers, A-31049 (Mar. 3, 1970)

Unique Property

To determine whether a deposit of stone is a common variety of stone, there must be a comparison of the material found in that deposit with other similar-type minerals in order to ascertain whether the material has a property giving it a distinct and special value; where no basis is shown for distinguishing the material in the deposit from that found in other deposits of commonly occurring stone except that some material from the first deposit has been marketed while none has been marketed from the other deposits, and where comparison with other materials which are used for the same purposes for which the material is allegedly valuable is not possible because those purposes are not adequately explained and other materials used for the same purposes are not identified, it is properly determined that the material in the particular deposit is a common variety of stone not subject to location under the mining laws of the United States after July 23, 1955.

United States v. Norman Rogers, A-31049 (Mar. 3, 1970)

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Unique Property--Continued

The mere showing that volcanic rock on mining claims be useful for filter rock in sewage treatment plants does not adequately establish that the rock is not a common variety of stone within the meaning of the act of July 23, 1955, where it appears that volcanic rock widely found in abundance may have desirable characteristics for filter rock and there is no detailed showing of any unique property in the rock within the claims giving it a special and distinct value for such purposes.

United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (Mar. 27, 1970)

CONTESTS

A Government motion on an appeal to the Secretary by mining claimants to dismiss contest proceedings against two mining claims will be granted without prejudice and a Bureau order remanding those proceedings withdrawn where it appears that the evidence at a hearing did not specifically relate to the claims and there is no useful purpose at this time for such further proceedings.

United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (Mar. 27, 1970)

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a prima facie showing that there has not been a discovery, the burden of proof is upon the contestees to show by a preponderance of the evidence that a discovery has been made.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

MINING CLAIMS--Continued

CONTESTS--Continued

Where land embracing mining claims and a mill site has been condemned by the Navy for use as a gunnery range, the Department of the Interior has jurisdiction to determine if the mining claims were validated by a discovery of a valuable mineral deposit at the time of the taking and if the requirements of the law as to mill sites were satisfied; it has no jurisdiction over questions concerning any monetary compensation for the taking.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

Where, pursuant to a departmental decision, mining claimants have requested a further hearing in a contest proceeding to submit additional evidence to show they have a valid discovery on mining claims, a further hearing will be ordered where the claimants indicate that they will be prepared to submit evidence critical to a final determination of the validity of their claims.

United States v. Paul B. Dessieux et al., A-31016 (Supp.) (May 20, 1970)

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a prima facie showing that there has not been a discovery, the burden of proof is upon the contestees to show by a preponderance of the evidence that a discovery has been made.

The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint.

United States v. J. R. Osborne et al., A-31030 (May 26, 1970) 77 I. D. 83

Where a hearing examiner's decision that a mining claim was validated by a discovery of a valuable building stone deposit marketable prior to and

MINING CLAIMS--Continued

CONTESTS--Continued

subsequent to the act of July 23, 1955, is not supported by a preponderance of the evidence, the decision must be overturned in that respect and the claim declared invalid.

United States v. Clarence T Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

A mining claim is properly declared null and void when the contestee responds to a Government complaint charging a lack of discovery and nonmineral character of the land within the time required for filing an answer but the response fails to deny the allegations of the complaint and, therefore, the allegations of the complaint are taken as admitted.

United States v. Willie Walker, IBLA-70-50 (Sept. 24, 1970)

Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

United States v Frank and Wanita Melluzzo, et al., IBLA 70-149 (Oct. 7, 1970) 77 I. D. 172

The fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of res judicata, from bringing adverse proceedings against the claim when an application for patent to the claim is filed.

United States v. H. B. Webb, IBLA 70-33 (Oct. 15, 1970)

A mining claim is properly declared null and void when the contestee failed to answer timely a Government contest complaint which charged that

MINING CLAIMS--Continued

CONTESTS--Continued

there had not been a valid discovery within the claim, and the complaint and regulations provide that failure to answer within 30 days will be taken as an admission of the allegations in the complaint.

United States v. George Ernsbarger, IBLA 70-48 (Oct. 29, 1970)

In an administrative proceeding to determine the validity of a mining claim, due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. The procedure followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases is in compliance with the Administrative Procedure Act, 5 U.S.C. sec. 551 et seq. (Supp. V, 1965-69).

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

Where a Government contest is brought in 1963 against sand and gravel placer mining claims located before 1955 on charges that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges are properly construed as raising the issue of whether a valid discovery of a common variety of sand and gravel was made prior to July 23, 1955, particularly where the contestees expressly alleged in their answer to the complaint that materials from the claims were marketed at a profit prior to that date and both parties submitted evidence bearing upon that question at the hearing.

United States v. Neil Stewart et al., IBLA-70-42 (Dec. 9, 1970)

The Government's mineral examiners are under no obligation either to rehabilitate discovery points or explore beyond current workings of a mining claimant in attempting to verify a claimed discovery. When a mining claimant charges the Government's examiners failed to examine a

MINING CLAIMS--Continued

CONTESTS--Continued

working which should have been examined, it is incumbent upon the claimant to show mineralization of significant value has been exposed at that point.

United States v. Frank W. Whitenack, IBLA 70-20 (Dec. 9, 1970)

DETERMINATION OF VALIDITY

A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to test a claim for discovery beyond examining the discovery points made available by the mining claimant.

United States v. Ruby LaRose Green, A-31031 (Mar. 25, 1970)

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a prima facie showing that there has not been a discovery, the burden of proof is upon the contestees to show by a preponderance of the evidence that a discovery has been made.

When there has been a severance of a mining claim, each part of the severed claim is independently subject to all the requirements of the mining law, without regard to the remainder of the claim, and a claimant of a severed portion must show a valid discovery within its limits, or that portion will be declared null and void.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

Under the mining laws of the United States one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

operations, the locator must show that he has made a discovery of a valuable mineral deposit within the limits of the claim in order to retain his possession.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

Lode claims cannot be validly located for deposits of flagstone which, as building stone can be located only as placer claims.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a prima facie showing that there has not been a discovery, the burden of proof is upon the contestees to show by a preponderance of the evidence that a discovery has been made.

United States v. J. R. Osborne et al., A-31030 (May 26, 1970) 77 I. D. 83

The Department of the Interior has been granted plenary power in the administration of the public lands, and it has authority, after proper notice and upon adequate hearing, to determine the validity of an unpatented mining claim.

In order to demonstrate the validity of a mining claim it must be shown as a present fact that the claim is valuable for mining purposes.

United States v. Elsie Cody, IBLA 70-23 (Nov. 13, 1970)

MINING CLAIMS --Continued

DETERMINATION OF VALIDITY--Continued

Even if deposits of sand suitable for use in glass manufacturing may be considered uncommon varieties within the meaning of the act of July 23, 1955, and locatable thereafter, there must still be a determination that the deposits constitute valuable mineral deposits under the mining laws by application of the prudent man test as implemented by the marketability test in order to validate the mining claims for such deposits.

Unites States v. Maurice Duval, et al., IBLA 70-18 (Nov. 23, 1970)

The Government's mineral examiners are under no obligation either to rehabilitate discovery points or explore beyond current workings of a mining claimant in attempting to verify a claimed discovery. When a mining claimant charges the Government's examiners failed to examine a working which should have been examined, it is incumbent upon the claimant to show mineralization of significant value has been exposed at that point.

United States v. Frank W. Whitenack, IBLA 70-20 (Dec. 9, 1970)

DISCOVERY

Mining claims located for deposits of decomposed granite and building stone are properly declared null and void where the evidence supports a finding that the deposits are common varieties of stone located after July 23, 1955.

United States v. Bedrock Mining Co. et al., IBLA-70-27 (Sept. 23, 1970)

To constitute a valid discovery upon a gold placer claim there must be shown to exist within the limits of the claim a valuable deposit of the minerals which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, and in making this determination, the Secretary may consider whether there is a reasonable prospect that the gold can be extracted, removed, and marketed at a profit.

MINING CLAIMS--Continued

DISCOVERY--Continued

Evidence of mineral deposit which is sufficient only to warrant further exploration is not enough to establish a discovery under the mining laws.

The economic value of common varieties of sand and gravel and building stone found on a gold placer claim and not locatable under the mining laws cannot be considered in the evaluation of the value of the gold to determine whether there has been a discovery of a valuable deposit of gold on the claim.

United States v. Silverton Mining and Milling Company, IBLA-70-22 (Sept. 23, 1970)

An application for a mineral patent will be rejected and the mining claim declared null and void where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content.

United States v. H. B. Webb, IBLA 70-33 (Oct. 15, 1970)

Even if deposits of sand suitable for use in glass manufacturing may be considered uncommon varieties within the meaning of the act of July 23, 1955, and locatable thereafter, there must still be a determination that the deposits constitute valuable mineral deposits under the mining laws by application of the prudent man test as implemented by the marketability test in order to validate the mining claims for such deposits.

In applying the prudent man test of discovery to mining claims containing vast deposits of sand allegedly valuable for use in glass manufacture, it is necessary to show that the deposits were marketable at a profit prior to the withdrawal of land embracing the claims; the mere fact that the claims are nearer a glass manufacturer than its present source of supply is not sufficient to show marketability where there is no general open market for such material and there was no direct attempt to capture a part of the limited and exclusive glass sand market prior to the withdrawal.

United States v. Maurice Duval, et al., IBLA 70-18 (Nov. 23, 1970)

MINING CLAIMS--Continued

DISCOVERY--Continued

In order to satisfy the requirements for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where mining claimants fail to prove by a preponderance of the evidence that the materials from their claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

Generally

To constitute a valid discovery on a mining claim there must be shown to exist within the limits of the claim a valuable deposit of mineral which would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not enough to show relatively minor gold and platinum or other mineral values which, at some time in the past, may have supported small scale mining or which may, depending upon economic and technological developments, warrant further attention at some indefinite future date.

United States v. Ruby LaRose Green, A-31031 (Mar. 25, 1970)

To constitute a valid discovery on a mining claim there must be shown to exist within the limits of the claim a valuable deposit of mineral which would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, and the test of discovery is the same whether a patent is being applied for by the mining claimant or the claim is being contested by the United States in the absence of a patent application.

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

When there has been a severance of a mining claim, each part of the severed claim is independently subject to all the requirements of the mining law, without regard to the remainder of the claim, and a claimant of a severed portion must show a valid discovery within its limits, or that portion will be declared null and void.

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

For a lode claim to be valid there must be shown the discovery of a vein or lode within the claim having sufficient mineralization to justify a prudent man in expending his time and money with the expectation of developing a valuable mine.

United States v. Ray L. Steven et al., A-31052 (May. 13, 1970)

There has been no discovery under the mining laws of a valuable deposit of silica and wollastonite where they are constituents of a quartzite building stone and cannot be economically mined, separated, and sold for other industrial or commercial purposes; and where the building stone of which they are a part has no unique property which gives it a special and distinct value for building stone above that of other common varieties of stone,

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

mining claims for such material are subject to the act of July 23, 1955.

Evidence which shows only that further prospecting should be undertaken to determine the presence of uranium in mining claims fails to meet the test of discovery of a valuable mineral deposit under the mining laws, which, at the least, requires that sufficient mineralization be shown to warrant a prudent man in expending further time and money with the expectation of developing a profitable mine.

United States v. Clarence T Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

United States v. H. B. Webb, IBLA 70-33 (Oct. 15, 1970)

To demonstrate a valid discovery upon a mining claim it must be shown that minerals have been found within the limits of the claim in such quantity and of such quality as to warrant a man of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Evidence which shows only the existence of low values in gold which would not equal the cost of recovery cannot be coupled with hope or belief that minerals of greater value exist within the claim or with speculation that future demand will make valuable that which cannot be economically mined today as a substitute for the finding of minerals of present economic worth.

United States v. Elsie Cody, IBLA 70-23 (Nov. 13, 1970)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a lode or vein bearing mineral of such quality and in such quantity as to warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is exposed mineralization which merely gives rise to a hope or expectation that a valuable mineral deposit may be found upon further exploration.

The Government's mineral examiners are under no obligation either to rehabilitate discovery points or explore beyond current workings of a mining claimant in attempting to verify a claimed discovery. When a mining claimant charges the Government's examiners failed to examine a working which should have been examined, it is incumbent upon the claimant to show mineralization of significant value has been exposed at that point.

United States v. Frank W. Whitenack, IBLA 70-20 (Dec. 9, 1970)

Marketability

Mining claims located for decomposed granite and building stone are properly declared null and void where the evidence supports a finding that the deposits of such materials are common varieties subject to the act of July 23, 1955, and the prudent man test of a discovery of a valuable mineral deposit, as complemented by the marketability test, was not satisfied as of that time.

United States v. Amos D. Robinette et al., A-31036 (Mar. 4, 1970)

The locatability after July 23, 1955, of a material under the trade name of decomposed granite, actually a decomposition of common gneiss rock, allegedly having special properties not found in ordinary sand and gravel making it cohesive and useful as a binder for lawn use and mixing with other substances primarily for sub-base construction purposes, is to be determined by whether it is a common variety of stone rather than a common variety of sand and gravel, and it

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

is properly determined to be a common variety of stone where it appears that the material occurs extensively thoughout the area and elsewhere, and, where the material was not marketable prior to the act of July 23, 1955, there was not a valuable mineral deposit on mining claims for such material within the meaning of the mining laws necessary to validate the claims as of the date of the act, and the claims are properly declared null and void.

Building stone of common gneiss rock and limestone useful only for construction work for walls, chimneys, and the limestone possibly for roofing granules also, having no special and distinct properties for such purposes are common varieties subject to the act of July 23, 1955, removing such materials from location under the mining laws, and mining claims located for such stone prior thereto are properly held to be invalid for lack of discovery as of that date where at the most only nominal sales of the stone were made in 1947-1950 and little or no sales were made in the subsequent period until July 23, 1955.

United States v. Amos D. and Lena S. Robinette, A-31133 (Mar. 4, 1970)

Mining claims located prior to the act of July 23, 1955, allegedly valuable for deposits of decomposed granite and building stone are properly declared null and void where the materials are not shown to have any special properties but are common varieties subject to the act, and were not marketable prior to that time because of access problems and the general lack of a demand which could not be met from other more economically feasible sources.

United States v. Evelyn T. Harding et al., A-31138 (Mar. 4, 1970)

The marketability of common varieties of sand, gravel or stone must be shown as of the date of the act of July 23, 1955, in order to sustain mining claims located for such materials prior to that time. The test does not require a showing that materials have actually been sold at a profit as of that time, but that they could have been; however, in an area such as the Las Vegas Valley where there are vast quantities of sand and gravel, the lack of sales from mining claims

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

raises a presumption that a prudent man could not market the materials from the claims and the presumption is not overcome by theoretical and hypothetical evidence as to there being a general market for such materials.

The showing of some production and sales of sand and gravel from 1956 to 1960 on two adjoining claims no longer owned by the contestee is insufficient by itself to show that sand and gravel from large acreages of mining claims held by the contestee in an area of vast sand and gravel sources, some closer to the market areas than the contestee's claims, were marketable at a profit as of July 23, 1955, when such deposits were removed from location under the mining laws.

United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (Mar. 27, 1970)

To satisfy the requirements for discovery on a placer claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that at most the material on the claim was suitable for commercial uses and theoretically could possibly have been marketed at a profit as of July 23, 1955, is insufficient to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void.

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make that showing the claim is properly declared null and void.

United States v. Ernest Higbee et al., A-31063 (Apr. 1, 1970)

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

It is not necessary to show that minerals have actually been sold in order to satisfy the requirements of discovery on a placer mining claim located for deposits of clay or building stone on land since closed to mining location, but it must be shown that the material on the claim could have been extracted, removed, and marketed at a profit prior to the time that the land was closed to operation of the mining laws.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

If deposits of flagstone in mining claims are not shown to have been marketable as of the time the lands in the claims were condemned for use by the United States Navy as a gunnery range, there was not a valid discovery of a valuable mineral deposit of such stone as required to validate the claims at that time.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make that showing the claim is properly declared null and void.

United States v. J. R. Osborne et al., A-31030 (May 26, 1970) 77 I. D. 83

The "marketability rule" which was formulated by the Department and judicially approved is not such a rule as is required to be published in the Federal Register in accordance with the Administrative Procedure Act.

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

The Government, in establishing its prima facie case that there has not been a discovery of a valuable mineral deposit, is not required to prove the lack of any economic value by surveying all market possibilities.

Where the Government has presented a prima facie case that there has not been a discovery of a valuable mineral deposit, the mining claimants then have the burden of proving by a preponderance of the evidence that there was a discovery of a valuable mineral composed of commonly found minerals which could have been marketed at a profit before the land was withdrawn from appropriation under the mining laws.

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

Findings by a hearing examiner in a mining contest that the marketability test was not satisfied as to building stone and a pumicite-like material prior to a withdrawal of the land will not be disturbed where the factual conclusions could be deduced from testimony at the hearing.

United States v. William D. Pulliam et al., IBLA 70-29 (Dec. 8, 1970)

A mining claim located for sand and gravel prior to July 23, 1955, is properly held to be null and void where it is not shown that material from the claim could have been profitably extracted, removed and marketed at that date.

United States v. Neil Stewart et al., IBLA-70-42 (Dec. 9, 1970)

HEARINGS

In a case where mining claims have been declared null and void for lack of a timely discovery of a valuable mineral deposit locatable under the mining laws prior to July 23, 1955, a further hearing to produce additional evidence relating to the validity of the claims will be denied where there appear to be no reasons warranting further proceedings and there is no indication that further evidence could be produced which would change the decision as no such further evidence was submitted in a later case involving the claimants and similar claims for the same materials in the same area.

United States v. Amos D. Robinette et al., A-31036 (Mar. 4, 1970)

Where, pursuant to a departmental decision, mining claimants have requested a further hearing in a contest proceeding to submit additional evidence to show they have a valid discovery on mining

MINING CLAIMS--Continued

HEARINGS--Continued

claims, a further hearing will be ordered where the claimants indicate that they will be prepared to submit evidence critical to a final determination of the validity of their claims.

United States v. Paul B. Dessieux et al., A-31016 (Supp.) (May 20, 1970)

Where a hearing examiner's decision that a mining claim was validated by a discovery of a valuable building stone deposit marketable prior to and subsequent to the act of July 23, 1955, is not supported by a preponderance of the evidence, the decision must be overturned in that respect and the claim declared invalid.

A request for a further hearing in a mining claim contest will be denied where the forest Service objects, the contestees fail to show any equitable basis for holding a further hearing, they fail to make a tender of proof which would tend to establish a valid discovery, and it appears that the request is simply for additional time to prospect and attempt to make a discovery of a valuable mineral deposit.

United States v. Clarence T. Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

United States v Frank and Wanita Melluzzo, et al., IBLA 70-149 (Oct. 7, 1970) 77 I. D. 172

A request by mining claimants for a further hearing in a mining claim contest will be denied where it does not appear that it could be productive of evidence which would show that deposits

MINING CLAIMS--Continued

HEARINGS--Continued

of sand were marketable prior to a withdrawal of the land as necessary to validate the claimant's claim, as a tender of some additional evidence merely corroborates the determination that there was no market at that time, and where there is no equitable basis shown justifying another hearing.

United States v. Maurice Duval, et al., IBLA 70-18 (Nov. 23, 1970)

In an administrative proceeding to determine the validity of a mining claim, due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. The procedure followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases is in compliance with the Administrative Procedure Act, 5 U.S.C. sec. 551 et seq. (Supp. V, 1965-69).

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

Findings by a hearing examiner in a mining contest that the marketability test was not satisfied as to building stone and a pumicite-like material prior to a withdrawal of the land will not be disturbed where the factual conclusions could be deduced from testimony at the hearing.

United States v. William D. Pulliam et al., IBLA 70-29 (Dec. 8, 1970)

LANDS SUBJECT TO

A mining claim located before August 11, 1955, on land partly within an existing powersite withdrawal is null and void ab initio as to that land.

T. L. and George F. Bruckner, A-31105 (Mar. 25, 1970)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

The equitable adjudication authority of the Secretary of the Interior does not extend to the validating and patenting of a placer mining claim located on land included in a powersite classification since there cannot be substantial compliance with the mining laws in the case of claims located on land withdrawn from mining location.

Pacific Coast Gasoline Company, A-31120
(Apr. 17, 1970)

Lode mining claims are properly declared null and void ab initio when they are located on land not open to appropriation under the mining laws because the minerals in the lands have been reserved to the grantor in perpetuity in a warranty deed which conveyed only the surface to the United States in consummation of a Forest Exchange, pursuant to the act of March 20, 1922, as amended, 16 U.S.C. secs. 485, 486 (1964)

James W. Hansen et al., IBLA 70-208
(Dec. 2, 1970)

LOCATION

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

United States v. Ernest Higbee et al., A-31063
(Apr. 1, 1970)

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

United States v. J. R. Osborne et al., A-31030
(May 26, 1970) 77 I.D. 83

MINING CLAIMS--Continued

LODE CLAIMS

For a lode claim to be valid there must be shown the discovery of a vein or lode within the claim having sufficient mineralization to justify a prudent man in expending his time and money with the expectation of developing a valuable mine.

Lode claims cannot be validly located for deposits of flagstone which as building stone can be located only as placer claims.

United States v. Ray L. Steven et al., A-31052
(May 13, 1970)

Lode claims cannot validly be located for deposits of quartzite building stone which under the act of August 4, 1892, can be located only as placer claims.

United States v. Clarence T. Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I.D. 97

MILL SITES

No right to a mill site, upon which there is no quartz mill or reduction works, can be established unless the site is used for mining or milling purposes in connection with a valid lode claim.

United States v. Lester E. Martin et al., A-31050
(Apr. 3, 1970)

The location of land for a millsite to be used in conjunction with a placer mining claim was not authorized until enactment of the act of March 18, 1960.

Pacific Coast Gasoline Company, A-31120
(Apr. 17, 1970)

Where land embracing mining claims and mill site has been condemned by the Navy for use as a gunnery range, the Department of the Interior has

MINING CLAIMS--Continued

MILL SITES--Continued

jurisdiction to determine if the mining claims were validated by a discovery of a valuable mineral deposit at the time of the taking and if the requirements of the law as to mill sites were satisfied; it has no jurisdiction over questions concerning any monetary compensation for the taking.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

PATENT

An application for a mineral patent will be rejected and the mining claim declared null and void where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content.

United States v. H. B. Webb, IBLA 70-33 (Oct. 15, 1970)

PLACER CLAIMS

Lode claims cannot be validly located for deposits of flagstone which as building stone can be located only as placer claims.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

Lode claims cannot validly be located for deposits of quartzite building stone which under the act of August 4, 1892, can be located only as placer claims.

United States v. Clarence T. Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

MINING CLAIMS--Continued

POSSESSORY RIGHT

Under the mining laws of the United States one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the locator must show that he has made a discovery of a valuable mineral deposit within the limits of the claim in order to retain his possession.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

POWER SITE LANDS

A mining claim located before August 11, 1955, on land partly within an existing powersite withdrawal is null and void ab initio as to that land.

T. L. and George F. Bruckner, A-31105 (Mar. 25, 1970)

The equitable adjudication authority of the Secretary of the Interior does not extend to the validating and patenting of a placer mining claim located on land included in a powersite classification since there cannot be substantial compliance with the mining laws in the case of claims located on land withdrawn from mining location.

Pacific Coast Gasoline Company, A-31120 (Apr. 17, 1970)

SURFACE USES

A mining claim is properly declared subject to the act of July 23, 1955, if the claimant fails to show the discovery of a valuable mineral deposit within the limits of the claim.

United States v. Ruby LaRose Green, A-31031 (Mar. 25, 1970)

MINING CLAIMS--Contineud

WITHDRAWN LAND

A mining claim located before August 11, 1955, on land partly within an existing powersite withdrawal is null and void ab initio as to that land.

T. L. and George F. Bruckner, A-31105 (Mar. 25, 1970)

If deposits of flagstone in mining claims are not shown to have been marketable as of the time the lands in the claims were condemned for use by the United States Navy as a gunnery range, there was not a valid discovery of a valuable mineral deposit of such stone as required to validate the claims at that time.

Where land embracing mining claims and a mill site has been condemned by the Navy for use as a gunnery range, the Department of the Interior has jurisdiction to determine if the mining claims were validated by a discovery of a valuable mineral deposit at the time of the taking and if the requirements of the law as to mill sites were satisfied; it has no jurisdiction over questions concerning any monetary compensation for the taking.

United States v. Ray L. Steven et al., A-31052 (May 13, 1970)

Where the Government has presented a prima facie case that there has not been a discovery of a valuable mineral deposit, the mining claimants then have the burden of proving by a preponderance of the evidence that there was a discovery of a valuable mineral composed of commonly found minerals which could have been marketed at a profit before the land was withdrawn from appropriation under the mining laws.

United States v. William D. Pulliam et al., IBLA 70-29 (Dec. 8, 1970)

MINING OCCUPANCY ACT

GENERALLY

Since the granting of relief pursuant to the Mining Claims Occupancy Act is predicated upon a showing of residential use of land in a mining claim subsequent to July 23, 1955, an applicant for relief under the act who was, on that date and throughout the qualifying period, in military service cannot invoke the provisions of section 501 of the Soldiers' and Sailors' Civil Relief Act of 1940, the benefits of which are available only to persons who initiated or acquired rights under the public land laws prior to entering military service.

Earl M. Hyde, A-31080 (Jan. 20, 1970)

MINING OCCUPANCY ACT--Continued

GENERALLY--Continued

The act of October 23, 1962, does not apply to occupants of mining claims which were invalidated or relinquished prior to the date of enactment of that act.

Grant H. Garcia, A-31156 (May 5, 1970)

CONVEYANCES

Under the act of October 23, 1962, the Secretary of the Interior can convey an interest in land under the administrative jurisdiction of the Forest Service to a "qualified applicant" only with the consent of the head of the administering agency, and where it is determined that an applicant for the conveyance of such land is not a "qualified applicant," the Secretary lacks authority to consider an application for the conveyance of any interest in the land.

Charles H. and Bernice I. Waugaman, A-31071 (Jan. 16, 1970)

MINING OCCUPANCY ACT--Continued

PRINCIPAL PLACE OF RESIDENCE

A cabin which is used intermittently for no more than a few weeks at any time during the year, while regular residence is concurrently maintained elsewhere, does not constitute a principal place of residence within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected.

Charles H. and Bernice I. Waugaman, A-31071 (Jan. 16, 1970)

A cabin which was used only during periods of leave from military service and on weekends during the years 1955 to 1960 does not constitute "a principal place of residence" within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected.

Earl M. Hyde A-31080 (Jan. 20, 1970)

The act of October 23, 1962, requires that an applicant and his predecessors must have occupied valuable improvements on a mining claim as a principal place of residence during the 7-year period immediately preceding July 23, 1962, and where there is no evidence as to the use made of a claim during the first 5 years of that period, and where the applicant indicates a desire to submit additional evidence relating to his own use of the claim during the last 2 years of the qualifying period, the case will be remanded to the Bureau of Land Management to permit the development of additional evidence.

Frank O. and Dorothy B. O'Mea, A-31084 (Jan. 27, 1970)

Where the preponderance of the evidence shows that the owner of relinquished mining claims has lived on the claims from early spring to late fall each year, with only infrequent absences to obtain supplies or to attend to personal business, and that residence during the remainder of the year is not possible because of inaccessibility of the land due to weather conditions, the claims can be considered a principal place of residence for the owner

MINING OCCUPANCY ACT--Continued

PRINCIPAL PLACE OF RESIDENCE--Continued

even though she and her husband have a permanent home in town where he works and they live when not on the claims.

Bernice H. Doll, A-31141 (Apr. 27, 1970)

A case appealed to the Secretary of the Interior from a rejection of an application under the Mining Claims Occupancy Act may be remanded for a hearing if the record is vague, uncertain and inconclusive as to the nature and extent of occupancy of the mining claim.

Eugene P. Tiscornia, Sr. Margaret Tiscornia, IBLA 70-37 (Dec. 30, 1970)

QUALIFIED APPLICANT

The right or privilege to qualify as an applicant under the act of October 23, 1962, cannot be assigned, but it may pass through devise or descent in the same manner as that in which property customarily is transferred by those means and the transfer is not limited only to the first devisee.

If the occupant-owner of residential improvements on an unpatented mining claim could have qualified on October 23, 1962, as an applicant for relief under the act of that date, the right or privilege of qualifying is not lost or destroyed by the failure of his heirs or devisees, who seek the benefits of his eligibility, to reside upon the claim themselves.

William and Paul G. Rafferty, A-31085 (Mar. 27, 1970) 77 I. D. 26

The act of October 23, 1962, does not apply to occupants of mining claims which were invalidated or reliquished prior to the date of enactment of that act.

Grant H. Garcia, A-31156 (May 5, 1970)

NATIONAL PARK SERVICE AREAS

LAND

Acquisition

A statutory authorization is necessary to support the acquisition of land or an interest in land, including a scenic easement, regardless of whether the acquisition is by purchase or donation.

Donation and Acceptance of "Scenic Easements" in The Vicinity of The Chesapeake and Ohio Canal National Monument, M-36805 (May 12, 1970) 77 I. D. 69

OIL AND GAS LEASES

GENERALLY

Where the Secretary has determined that a drawing held to determine priority among offers for land opened to leasing by public notice was improperly conducted and has directed that a new drawing be held, offers filed thereafter prior to the announcement of the new drawing are properly rejected and will not be retained pending such announcement.

R. G. Boekel, A-31069 (Jan. 27, 1970)

A lessee of an oil and gas lease issued under section 17 of the Mineral Leasing Act, as amended, is not entitled to extract or mine oil shale, native asphalt, and bituminous substances subject to section 21 of the Mineral Leasing Act, and is not entitled to any refund of rentals upon the basis of an impairment of contractual rights or to the issuance of new leases giving such rights.

Duncan Miller, A-31095 (Feb. 2, 1970)

OIL AND GAS LEASES --Continued

ACQUIRED LANDS LEASES

Acquired lands oil and gas lease offers are properly rejected where the administering Federal agency has not given consent to issuing a lease because of uncertainty as to title to the lands involved.

Carolyn C. Stockmeyer, Individually and as Executrix of the Succession of Edwin W. Stockmeyer, IBLA 70-117 (Oct. 30, 1970)

APPLICATIONS

Generally

Where the Secretary has determined that a drawing held to determine priority among offers for land opened to leasing by public notice was improperly conducted and has directed that a new drawing be held, offers filed thereafter prior to the announcement of the new drawing are properly rejected and will not be retained pending such announcement.

R. G. Boekel, A-31069 (Jan. 27, 1970)

Where an area of public land has been declared in a public land order not to be available for noncompetitive oil and gas leasing until certain steps have been taken, and the requisite steps have not been taken, the land is not subject to oil and gas leasing and offers for it are properly rejected.

Mark B. Ringstad et al., Inlet Oil Corporation et al., Robert L. Lawler et al., A-31111, A-31115, A-31134, A-31188 (Mar. 17, 1970)

An oil and gas lease offeror cannot raise as an objection to the rejection of a later offer the rejection of an earlier one which has been finally disposed of.

Duncan Miller, IBLA-70-71 (Dec. 21, 1970)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

As a condition to the issuance of an oil and gas lease for oil shale lands subject to the Secretary of the Interior's Order No. 2906 of September 27, 1968, an applicant for such an oil and gas lease must execute the special stipulations required by that order.

William S. Burness, IBLA 70-72 (Dec. 24, 1970)

Description

Where an area sought to be excluded from a larger parcel of land in an oil and gas lease offer is described by metes and bounds in terms which do not satisfy the pertinent regulation, it makes the offer defective as to the parcel and subject to rejection to that extent.

Finlay MacLennan, A-31068 (Jan. 16, 1970)

Drawings

Where the Secretary has determined that a drawing held to determine priority among offers for land opened to leasing by public notice was improperly conducted and has directed that a new drawing be held, offers filed thereafter prior to the announcement of the new drawing are properly rejected and will not be retained pending such announcement.

R. G. Boekel, A-31069 (Jan. 27, 1970)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party In Interest

Where an oil and gas lease offer, filed on a drawing entry card in a simultaneous filing procedure, contains the name of a party in interest other then the offeror, and the required statement of interest, copy or explanation of the agreement between the parties, and evidence of the qualifications of the additional party to hold such interest are not filed within the time allowed by the Department's regulations, the offer is properly rejected.

E. S. Lippert, A-31173 (May 14, 1970)

CANCELLATION

Where an oil and gas lease is considered to have been terminated pursuant to 30 U.S.C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was relinquished, who accepted the refund without question, it is correct to hold that the lessee's rights in the terminated lease have been extinguished, and that a new oil and gas lease, duly issued for such lands and thereafter assigned to a bona fide purchaser, is valid.

Sarkeys, Inc., IBLA 70-660 (Nov. 27, 1970)
77 I.D. 207

CONSENT OF AGENCY

Acquired lands oil and gas lease offers are properly rejected where the administering Federal agency has not given consent to issuing a lease because of uncertainty as to title to the lands involved.

Carolyn C. Stockmeyer, Individually And As Executrix Of The Succession Of Edwin W. Stockmeyer, IBLA 70-117 (Oct. 30, 1970).

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

As a condition to the issuance of an oil and gas lease for oil shale lands subject to the Secretary of the Interior's Order No. 2906 of September 27, 1968, an applicant for such an oil and gas lease must execute the special stipulations required by that order.

William S. Burness, IBLA 70-72 (Dec. 24, 1970)

DISCRETION TO LEASE

Where the appropriate legal officers to the United States have, after due consideration, declared that in their respective opinions the United States does not have title to the mineral estate in certain described lands, it is within the Secretary's discretion to reject offers to lease such lands for oil and gas and to decline to reexamine the title for the purpose of responding to the offeror's contention that the title opinions are in error.

Carolyn C. Stockmeyer, Individually and as Executrix of the Succession of Edwin W. Stockmeyer, IBLA 70-117 (Oct. 30, 1970)

EXTENSIONS

The statutory and regualtory requirements that there must be a discovery of oil or gas in paying quantities on a segregated portion of a lease in order to qualify another segregated portion of the same lease for a two-year extension cannot be construed so as to require that in every instance there must be a fully, completed well on the site which is physically capable of producing oil or gas in paying quantities prior to the date of expiration.

Joseph I. O'Neil, Jr. Mobil Oil Corporation, IBLA 70-39 (Oct. 9, 1970) 77 I. D. 181

OIL AND GAS LEASES--Continued

FIRST QUALIFIED APPLICANT

A noncompetitive offer to lease for oil and gas is properly rejected where the land sought has been included in an oil and gas lease issued in response to a proper application filed earlier in time.

Duncan Miller, IBLA-70-71 (Dec. 21, 1970)

LANDS SUBJECT TO

Where the Secretary has determined that a drawing held to determine priority among offers for land opened to leasing by public notice was improperly conducted and has directed that a new drawing be held, offers filed thereafter prior to the announcement of the new drawing are properly rejected and will not be retained pending such announcement.

R. G. Boekel, A-31069 (Jan. 27, 1970)

Where an area of public land has been declared in a public land order not to be available for noncompetitive oil and gas leasing until certain steps have been taken, and the requisite steps have not been taken, the land is not subject to oil and gas leasing and offers for it are properly rejected.

Mark B. Ringstad et al., Inlet Oil Corporation et al., Robert L. Lawler et al., A-31111, A-31115, A-31134, A-31188 (Mar. 17, 1970)

OIL AND GAS LEASES--Continued

REINSTATEMENT

Oil and gas leases are peoperly declared to be automatically terminated where the rental payments are not received in the proper land office on the anniversary dates of the leases or subsequently even though the payments may have been mailed in time to be received on or before the anniversary dates, and the leases cannot be reinstated by the tender thereafter of the overdue rental payments.

Westates Petroleum Company, A-31117 (Mar. 4, 1970)

RENTALS

An oil and gas lease is properly declared to be automatically terminated for nonpayment of rental where a rental check has been returned from the bank as uncollectible and a substitute check was not signed prior to the anniversary date of the lease.

Duncan Miller, A-31095 (Feb. 2, 1970)

Where the rental for an oil and gas lease was not timely paid and the lease automatically terminated under section 31 of the Mineral Leasing Act, the land office properly noted the records and made the land available for leasing under the simultaneous filing procedures of 43 CFR 3123.9. The subsequent payment of the rental may not serve as a basis for reinstatement of the lease or give the lessee any rights under the terminated lease.

Duncan Miller, A-31087 (Feb. 4, 1970)

This Department has no authority to reinstate an oil and gas lease which has terminated under section 31 of the Mineral Leasing Act, as amended, for nonpayment of rentals on or before the anniversary date of the lease, even if the lessee was given erroneous advice over the telephone by Bureau of Land Management land office personnel as to whether or not the rental had been paid.

Duncan Miller, A-31148 (Mar. 2, 1970)

OIL AND GAS LEASES--Continued

RENTALS--Continued

This Department has no authority to reinstate an oil and gas lease which has terminated under section 31 of the Mineral Leasing Act, as amended, for nonpayment of rentals on or before the anniversary date of the lease, even if the lessee was given erroneous advice over the telephone by the Bureau of Land Management land office personnel that the rental had been paid.

Duncan Miller, A-31159 (Mar. 2, 1970)

Oil and gas leases are properly declared to be automatically terminated where the rental payments are not received in the proper land office on the anniversary dates of the leases or subsequently even though the payments may have been mailed in time to be received on or before the anniversary dates, and the leases cannot be reinstated by the tender thereafter of the overdue rental payments.

Westates Petroleum Company, A-31117 (Mar. 4, 1970)

Where a noncompetitive oil and gas lease is cancelled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion.

Beard Oil Company, IBLA 70-19 (Oct. 7, 1970) 77 I. D. 166

Where an oil and gas lease is considered to have been terminated pursuant to 30 U. S. C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was

POWER--Continued

PURCHASE OF FOR RESALE--Continued

preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which BPA takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable.

Bonneville Power Administration Net Billing Agreements Relating to the Hydro-Thermal Power Program, M-36812 (Sept. 21, 1970) 77 I. D. 141

PRIVATE EXCHANGES

CLASSIFICATION

Where, after a land office of the Bureau of Land Management dismissed a protest against a private exchange, the protestant shows that it had not been served properly with notice of the proposed classification of the public land for exchange, the decision will be set aside and the case remanded for compliance with the land classification procedures prescribed by the Department's regulations.

Depaoli Brothers, North American Rockwell Corporation, IBLA 70-525 (Sept. 22, 1970) 77 I. D. 122

PROTESTS

Where, after the land office of the Bureau of Land Management dismissed a protest against a private exchange, the protestant shows that it had not been served properly with notice of the proposed classification of the public land for exchange, the decision will be set aside and the case remanded for compliance with the land classification procedures prescribed by the Department's regulations.

Depaoli Brothers, North American Rockwell Corporation, IBLA 70-525 (Sept. 22, 1970) 77 I. D. 122

PUBLIC LANDS

(See also Boundaries and Surveys of Public Lands)

SPECIAL USE PERMITS

A request for renewal of a special use permit to occupy public land for the purpose of drilling an irrigation well is properly denied where the granting of such a request is dependent upon a showing of actual drilling during the life of the permit, coupled with a firm commitment to have the well completed without delay or, in the absence of any drilling, a showing that unforeseeable difficulties were encountered, coupled with a firm commitment to have a well completed without delay, and where the only reason given for failure to drill a well is the failure of the permittee's husband, on whom she relied to perform the drilling, to qualify for a well driller's license and the only evidence of a commitment to have a well completed is the permittee's belief that her husband is qualified to drill a well.

Margaret G. Qualman, A-31100 (Feb. 3, 1970)

It is proper to reject an application for a special land use permit on a tract of land which the state office intends to use in an exchange if the use of the land for a business under the permit would make it more difficult to consummate an exchange.

Where an application for a tract of land would be rejected either under the Small Tract Act or for a special land use permit, it is not necessary to to determine under which procedure the land should be disposed of when it is decided that the special land use permit actually filed was properly rejected.

Claude W. Bowlin, IBLA 70-36 (Sept. 25, 1970)

PUBLIC RECORDS

(See also Administrative Procedure Act)

Identifiable records under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, as amended, 25 U.S.C. secs. 452 et seq., accumulated in Bureau of Indian Affairs offices, including but not limited to contracts, programs, proposals, and budgets, shall be made available to any person who requests them, pursuant to, and subject to such restrictions as are contained in, the provisions of the Freedom of Information Act of 1967, 43 CFR 2.2, and 15 BIAM ch. 6.

Availability to the Public of Johnson-O'Malley Act Records, M-36808 (June 18, 1970)

PUBLIC SALES

GENERALLY

Where the Bureau of Land Management cancels a public sale of land and remands the case for a determination as to whether a new sale should be ordered after finding that one of two preference-right applicants was given preferential treatment by the land office, and where, thereafter, the allegedly injured applicant withdraws his application, the Bureau's decision will be vacated, and the original award of the land will be reinstated.

Edwin N. Woodbury Herbert J. and Margrita F. Klassen, A-31153 (Mar. 3, 1970)

RAILROAD GRANT LANDS

A vendee of land from a railroad is not an innocent purchaser for value of land excepted from the grant to the railroad as mineral land where the land had been extensively mined as a placer, the evidences of mining were plainly visible, a mineral location had been made on the land, and all these conditions were known or ought to have been known to the vendee at the time of the sale to it, particularly since the vendee itself was engaged in mining on adjacent lands.

United States v. Southern Pacific Company, A-31034 (Apr. 2, 1970) 77 I.D. 41

RAILROAD GRANT LANDS--Continued

Where an application is filed under Section 321 (b) of the transportation Act of 1940 alleging a conveyance to an innocent purchaser for value by a railroad grantee, the application may not be rejected on its face soley for the reason that the lands applied for have been classified as mineral in character subsequent to the time of the conveyance. It must also be shown that the lands were of known mineral character at any time between the date the railroad line was definitely located and the date of the original sale by the railroad and that the purchaser knew or should have known at the time of his purchase that the lands were of this character.

Southern Pacific Company, Louis G. Wedekind, IBLA 70-90 (Oct. 7, 1970) 77 I.D. 177

RES JUDICATA

The doctrine of res judicata has long been accepted and applied by the Department. However, the doctrine is generally invoked as a bar to a claim for relief only where there has been a final adjudication of a matter before the Department and where it is clear that the same facts and issues are involved in a subsequent matter before the Department.

Southern Pacific Company, Louis G. Wedekind IBLA 70-90 (Oct. 7, 1970) 77 I.D. 177

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

Where a provision for liquidated damages appears on its face to be unenforceable as a penalty and the Government offers no evidence to show why it should not be so viewed, the Board sustains the appeal.

Appeal of Graybar Electric Company, IBCA-773-4-69 (Feb. 12, 1970)

The Board denies a claim for additional compensation where an examination of the plans and specifications rebuts a contractor's contention that they indicated sufficient suitable soil would be available from excavation to construct the embankment and the contractor fails to offer any evidence to show that such variation as existed between staking and the plans exceeded the limits of permissible deviation.

Appeal of Lawrence L. Jaeger, IBCA-774-4-69 (Feb. 19, 1970)

The contractor has the burden of proving an excusable cause of delay and the extent to which performance was thereby delayed. Where appellant proved an excusable cause, but did not establish that it was thereby delayed, the Board denied contractor's claim for an extension of time.

Appeals of J & B Construction Company, Inc., IBCA Nos. 667-9-67 and 767-3-69 (Apr. 17, 1970)

An appeal will be denied where the appellant offers no proof in support of its claims. Appellant bears the burden of proving its allegations.

Appeal of Fulcrum Corporation of New Jersey, IBCA-745-11-68 (June 11, 1970)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

The Board will render a jury verdict award of compensation where the contractor has shown that some compensable extra work was performed in repairing storm damage but has not produced specific evidence of the costs of such compensable extra work.

Appeal of the Brezina Construction Company, Inc., IBCA-757-1-69 (Nov. 20, 1970)

The Government, in establishing its prima facie case that there has not been a discovery of a valuable mineral deposit, is not required to prove the lack of any economic value by surveying all market possibilities.

Where the Government has presented a prima facie case that there has not been a discovery of a valuable mineral deposit, the mining claimants then have the burden of proving by a preponderance of the evidence that there was a discovery of a valuable mineral composed of commonly found minerals which could have been marketed at a profit before the land was withdrawn from appropriation under the mining laws.

United States v. William D. Pulliam et al., IBLA 70-29 (Dec. 8, 1970)

A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not per se a basis for excusable delay. While under the rule of Schweigert v. United States, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where the contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

Appeal of Fulton Shipyard, IBCA-735-10-68 (Dec. 29, 1970) 77 I.D. 249

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal

An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing.

Appeal of Guy F. Atkinson Company, IBCA-795-8-69 (Jan. 6, 1970) 77 I.D. 1

An appeal to the Secretary of the Interior will be dismissed when the appellant withdraws the appeal.

Florence Emily Tagala v. Norman C. Gorsuch, Special Administrator of the Estate of Amanda Price, A-31241 (Jan. 9, 1970)

Raymond C. Hacker, et al., A-31253 (Mar. 13, 1970)

Ralph J. Mellin, A-31252 (Apr. 1, 1970)

Bridwell Oil Company, IBLA-70-51 (Aug. 3, 1970)

Don Holzhey, IBLA-71-3 (Aug. 25, 1970)

Frank J. Novosel, IBLA 71-12 (Oct. 5, 1970)

Louise Lakin Wailes, IBLA 71-42 (Oct. 5, 1970)

David Y. Jamieson v. Billy V. McCreary IBLA 71-31 (Oct. 16, 1970)

Mountain States Resources Corporation, IBLA 71-60 (Nov. 16, 1970)

Don A. Stringham, IBLA 70-105 (Dec. 30, 1970)

An appeal to the Secretary of the Interior will be dismissed when the appellant withdraws his appeal.

Duncan Miller, A-31176 (May 14, 1970)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal will be dismissed when the appellants cure the deficiencies noted in the decision appealed from, and the issue on appeal thus becomes moot.

Carl W. Boxberger, IBLA 70-670 (Aug. 3, 1970)

An appeal to the Director, Bureau of Land Management, will be dismissed when the appellants fulfill the requirements of the decision appealed from, and the issue on appeal thus becomes moot.

Dwight H. and Verna K. Huston, IBLA 70-672 (Aug. 3, 1970)

An appeal to the Director, Bureau of Land Management, will be dismissed when the appellant withdraws the protest that was the subject of the appeal.

Peabody Coal Company, IBLA-70-522 (Aug. 3, 1970)

An appeal to the Secretary of the Interior will be dismissed when the appellants fulfill the requirement of the decision appealed from and the issue on appeal thus becomes moot.

Hunton & Wilcox, IBLA-70-214 (Aug. 4, 1970)

An appeal to the Director, Bureau of Land Management, will be dismissed when the issue on appeal becomes moot.

Plateau Mining, Limited, IBLA-70-339 (Aug. 17, 1970)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

Where an appellant moved for reconsideration of a decision because it (i) objected to the emphasis placed by the Board in its principal decision upon a deficiency notice (ii) sought to introduce evidence relative to the deficiency notice, and (iii) claimed the Board's ruling at the hearing was unclear, reconsideration is denied inasmuch as (i) the deficiency notice was in the appeal file, and thus properly before the Board from the outset, (ii) the evidence was not newly discovered but was readily available to the appellant at the hearing, and (iii) clarification of the Board's ruling should have been requested at the hearing, since the function of a motion for reconsideration is not intended to correct procedural errors or omissions by a party in the presentation of its case.

Appeal of South Portland Engineering Company, IBCA-771-4-69 (Jan. 29, 1970)

Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

Appeals of John H. Moon & Sons, Inc., IBCA-814-12-69, IBCA-815-12-69 (May 14, 1970)
77 I.D. 78

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing To Appeal

A ruling by a hearing examiner denying a motion to dismiss some of the charges brought against a homestead entry on the ground that they relate to matters shown by the records of the Bureau of Land Management is an interlocutory order which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the contest.

Paul Unruh v. Wesley Laverne Edwards, A-31083 (Apr. 9, 1970)

Statement of Reasons

An appeal to the Secretary of the Interior will be dismissed when the appellant fails to file any statement of reasons in support of the appeal.

Donald R. Glyman, A-31221 (Jan. 9, 1970)

Jack Larson Logging, Inc., A-31243 (Feb. 19, 1970)

Merville A. and Margaret R. Mills, A-31251 (Apr. 1, 1970)

Santiago Engineering, Inc., IBLA 71-72 (Oct. 30, 1970)

M. S. Papulak, IBLA 71-47 (Nov. 4, 1970)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to file a statement of reasons in support of his appeal, although he was notified of the requirement, and he offers no justification for his failure to comply.

Lee E. McDonough, A-31255 (Apr. 30, 1970)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

An appeal to the Secretary of the Interior will be dismissed when the appellant fails to file a statement of reasons in support of the appeal.

Betty P. McMillan, IBLA 71-24 (Nov. 4, 1970)

Geocon, Inc., Cameo Minerals, Inc., IBLA 71-48 (Nov. 4, 1970)

An Appeal to the Secretary of the Interior will be dismissed when the appellant fails to file a statement of reasons in support thereof within the time required.

H. A. Birchfield et ux., IBLA 71-78 (Dec. 22, 1970)

An appeal to the Secretary of the Interior will be dismissed when the appellant fails to file a statement of reasons in support thereof.

James W. Smith, IBLA 71-75 (Dec. 24, 1970)

Timely Filing

An appeal to the Secretary of the Interior must be dismissed where the notice of appeal, although received during the 10-day grace period, was not transmitted until after the expiration of the 30-day period in which it was required to be filed.

Gary James Lungren, A-31256 (Mar. 9, 1970)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

An appeal to the Director of the Bureau of Land Management from a decision of a land office, although not acted upon by the Director, will be dismissed upon subsequent appeal to the Secretary of the Interior where it appears that no notice of appeal was filed in the land office which issued the decision, that the only notice of appeal was filed in the office of the Director nearly two months after notice was required to be filed in the land office, and that the filing fee, required with the notice of appeal, was not transmitted at all.

Calvin L. Howard, Jenadean Howard, A-31060 (Mar. 17, 1970)

EVIDENCE

In the absence of actual cost data for a large part of the claimed extra costs and in circumstances where estimates of such costs have been based primarily on formula cost of ownership figures for equipment for the time involved, formula calculations of fuel and oil costs, and a pro rata distribution of labor costs, the Board will use a jury verdict approach to determine the amount of an equitable adjustment for a changed condition to which the contractor is entitled.

Appeal of Ray D. Bolander Company, Inc., IBCA-331 (Mar. 30, 1970) 77 I. D. 31

The requisite mental capacity which a testator must have in order to make a valid testamentary disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself.

The bare allegation that a will is unnatural because of the relatively small devise to the heirs of the testator is insufficient to support a finding that such will is unnatural.

RULES OF PRACTICE--Continued

HEARINGS--Continued

modification and the performance; however, if the purchaser does not wish a hearing and none is held, the determination that it breached the contract will stand since it has the burden of proving that the contract was orally modified.

Parker Industries, Inc., A-31081 (Feb. 6, 1970)

In a case where mining claims have been declared null and void for lack of a timely discovery of a valuable mineral deposit locatable under the mining laws prior to July 23, 1955, a further hearing to produce additional evidence relating to the validity of the claims will be denied where there appear to be no reasons warranting further proceedings and there is no indication that further evidence could be produced which would change the decision as no such further evidence was submitted in a later case involving the claimants and similar claims for the same materials in the same area.

United States v. Amos D. Robinette et al., A-31036 (Mar. 4, 1970)

It is not an abuse of discretion for a hearing examiner to deny a second continuance of a hearing to permit a mining claimant to have his claims examined by a mining expert after the time allowed under a previous continuance has expired without any apparent effort on the part of the claimant to secure the examination, and there is no abuse of discretion on the part of a hearing examiner in failing to order a prehearing conference where none is requested.

United States v. Lester E. Martin et al., A-31050 (Apr. 3, 1970)

A hearing will not be granted in connection with a trade and manufacturing site application where the applicant fails to allege facts which, if proved, would entitle him to favorable consideration of his application.

Carl A. Bracale, Jr., A-31149 (Apr. 20, 1970)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A request for further hearing in a mining claim contest will be denied where the forest Service objects, the contestees fail to show any equitable basis for holding a further hearing, they fail to make a tender of proof which would tend to establish a valid discovery, and it appears that the request is simply for additional time to prospect and attempt to make a discovery of a valuable mineral deposit.

United States v. Clarence T Stevens and Mary D. Stevens, A-31088 (May 26, 1970) 77 I. D. 97

Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

United States v Frank and Wanita Melluzzo, et al., IBLA 70-149 (Oct. 7, 1970) 77 I. D. 172

A hearing officer is not disqualified nor will his findings be set aside in a mining contest upon a charge of bias in the absence of a substantial showing of bias.

United States v. Elsie Cody, IBLA 70-23 (Nov. 13, 1970)

A request by mining claimants for a further hearing in a mining claim contest will be denied where it does not appear that it could be productive of evidence which would show that deposits of sand were marketable prior to a withdrawal of the land as necessary to validate the claimant's claim, as a tender of some additional evidence merely corroborates the determination that there was no market at that time, and where there is no equitable basis shown justifying another hearing.

United States v. Maurice Duval, et al., IBLA 70-18 (Nov. 23, 1970)

RULES OF PRACTICE--Continued

HEARINGS--Continued

In an administrative proceeding to determine the validity of a mining claim, due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. The procedure followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases is in compliance with the Administrative Procedure Act, 5 U.S.C. sec. 551 et seq. (Supp. V, 1965-69).

United States v. William A. McCall and R. J. Kaltenborn, IBLA 70-379 (Nov. 25, 1970)

SUPERVISORY AUTHORITY OF SECRETARY

Where an heir has been erroneously omitted from an estate, and the three (3) year limitation has passed, the Secretary nonetheless has the power to reopen and remand the matter for further proceedings.

Estate of Fred Kearney, IA-S-4 (Jan. 26, 1970)

The Secretary has the power to waive his own regulations, and reopen an otherwise final probate determination, where it appears that an heir was inadvertently omitted from sharing in the estate, and the estate remains in a trust status, under the jurisdiction of the Secretary.

Estate of Dorothy Arnett, IA-S-5 (May 28, 1970)

WITNESSES

Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a

RULES OF PRACTICE--Continued

WITNESSES--Continued

separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

Appeals of John H. Moon & Sons, Inc., IBCA-814-12-69, IBCA-815-12-69 (May 14, 1970) 77 I.D. 78

A motion by an appellent to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (1) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hearing; and (v) as for summaries and other exhibits expunged from the appeal file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits.

Appeals of Cen-Vi-Ro of Texas, Inc., IBCA-718-5-68 and IBCA-755-12-68 (May 28, 1970) 77 I.D. 106

A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of

RULES OF PRACTICE--Continued

WITNESSES--Continued

evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice.

Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

Appeals of Al Johnson Construction Company and Morrison-Knudsen Company, Inc. and Al Johnson Construction Company, IBCA-789-7-69 and IBCA-790-7-69 (Sept. 30, 1970) 77 I.D.127

SCRIP

RECORDATION

A forest lieu selection right is extinguished when the base lands are reconveyed by the United States to the principal. The purported agent or assignee of the principal has no rights thereafter against the United States even if he recorded his power of attorney and other selection documents prior to the reconveyance.

Richard M. Lade, As Attorney in fact for C. W. Clarke Company, IBLA 70-4 (Dec. 29, 1970)

SPECIAL TYPES OF SCRIP

A forest lieu selection right is extinguished when the base lands are reconveyed by the United States to the principal. The purported agent or assignee of the principal has no rights thereafter against the United States even if he recorded his power of attorney and other selection documents prior to the reconveyance.

Richard M. Lade, As Attorney in fact for C. W. Clarke Company, IBLA 70-4 (Dec. 29, 1970)

VALIDITY

A forest lieu selection right is extinguished when the base lands are reconveyed by the United States to the principal. The purported agent or assignee of the principal has no rights thereafter against the United States even if he recorded his power of attorney and other selection documents prior to the reconveyance.

Richard M. Lade, as Attorney in fact for C. W. Clarke Company, IBLA 70-4 (Dec. 29, 1970)

SECRETARY OF THE INTERIOR

A statutory authorization is necessary to support the acquisition of land or an interest in land, including a scenic easement, regardless of whether the acquisition is by purchase or donation.

Donation and Acceptance of "Scenic Easements" in The Vicinity of the Chesapeake and Ohio Canal National Monument, M-36805 (May 12, 1970) 77 I. D. 69

Once a tribal council acts to deny a person's application for enrollment, and there is no provision in the tribal constitution or in an applicable act of Congress for appeal of that determination to the Secretary, there exists jurisdiction in the Secretary to review only the effect of the council's action on the distribution of tribal assets over which the Secretary has been granted authority as trustee by the Congress.

Appeal by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, in the Matter Of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, IA-1972-X-9 (Aug. 25, 1970) 77 I. D. 116

Involving 319.3 acres of land covered by water right applications under Sec. 5 of the 1902 Act (31 Stat. 790) and Sec. 3 of the 1912 Act (37 Stat. 265); when full payout of construction charges has been made and when the Secretary determines that a general pattern of family-size ownership has been established in the area, then the Secretary must deliver water, if available, to the entire tract, including the 159.3 acres of "excess" lands.

Excess Land Ownership, Reservation Division -- Yuma Project, California (El Rancho Del Rio, Inc.) M-36818 (Dec. 30, 1970) 77 I. D. 265

SMALL TRACT ACT

GENERALLY

The mere filing of a small tract application does not create in the applicant any right or interest in the land, and the Secretary in his discretion may refuse to consummate a sale at any time prior to issuance of patent.

Estate of Lyle K. Gross, IBLA 70-38 (Oct. 23, 1970) 77 I. D. 174

CLASSIFICATION

Public lands classified as disposable under the Act may be reclassified by the Secretary for retention by the Government.

Estate of Lyle K. Gross, IBLA 70-38 (Oct. 23, 1970) 77 I. D. 174

LANDS SUBJECT TO

Where an application for a tract of land would be rejected either under the Small Tract Act or for a special land use permit, it is not necessary to determine under which procedure the land should be disposed of when it is decided that the special land use permit actually filed was properly rejected.

Claude W. Bowlin, IBLA 70-36 (Sept. 25, 1970)

STATE COURTS

State statutes relating to partition of real property are not applicable to lands in which interests are owned by Indians subject to restraints on alienation imposed by federal statutes unless such federal statutes authorize application of such state statutes to such lands. Therefore, the laws relating to such lands in Oklahoma were not altered by the enactment, on March 2, 1970, of an amendment, ch. 40 (H. B. No. 1609), /1970/ Okla. laws 43, to Okla. Stat. tit. 12, Section 1501 (1961).

Effect of Recent Amendment to Oklahoma Partition Statutes on Lands in Which Undivided Interests are Owned By Indians in Trust or Restricted Status, Pursuant to Federal Statutes, M-36806 (June 3, 1970)

STATE LAWS

State statutes relating to partition of real property are not applicable to lands in which interest are owned by Indians subject to restraints of alienation imposed by federal statutes unless such federal statutes authorize application of such state statutes to such lands. Therefore, the laws relating to such lands in Oklahoma were not altered by the enactment, on March 2, 1970, of an amendment, ch. 40 (H. B. No. 1609), /1970/ Okla. laws 43, to Okla. Stat. tit. 12, Section 1501 (1961).

Effect of Recent Amendment to Oklahoma Partition Statutes on Lands in Which Undivided Interests are Owned By Indians in Trust or Restricted Status, Pursuant to Federal Statutes, M-36806 (June 3, 1970)

STATUTES

The Act of June 1, 1910, 36 Stat. 455 providing for sale of surplus land within the Fort Berthold

STATUTES--Continued

Indian Reservation and further providing for additional allotments in a designated portion of the area did not diminish the reservation and change the boundary to the area designated for additional allotments; other provisions of the act manifested an intent that the Indians of Fort Berthold Reservation retained a substantial interest in the area opened to sale and provisions for donation and expenditure of their funds and property were authorized to that end. Authorization for sale of the land within the reservation did not change the boundary of the reservation nor remove the sale area from reservation status.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Authority of the Bureau of Indian Affairs to Transfer To An Indian Tribe the Direction of Federal Employees Pursuant to the Provisions of R.S. Sec. 2072, 25 U.S.C. Sec. 48, M-36803 (Apr. 3, 1970) 77 I.D. 49

Indian tribes generally do not possess criminal jurisdiction over Non-Indians unless there still remains in force a treaty provision whereby a

STATUTES--Continued

tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over Non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

Criminal Jurisdiction of Indian Tribes Over Non-Indians, M-36810 (August 10, 1970) 77 I. D. 113

STATUTORY CONSTRUCTION

GENERALLY

A right-of-way within the meaning of Section 1 (7) of the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1(7) (1964) which authorizes the Secretary of the Interior to acquire lands and interests in lands, including scenic easements, in lands adjacent to a road right-of-way located within area of the National Park System, need not be limited to only roads open to vehicular motor traffic. The towpath of the Chesapeake and Ohio Canal National Monument is a road right-of-way within the meaning of that act.

Donation and Acceptance of "Scenic Easements" in the Vicinity of the Chesapeake and Ohio Canal National Monument, M-36805 (May 12, 1970) 77 I. D. 69

SURFACE RESOURCES ACT

GENERALLY

A mining claim is properly declared subject to the act of July 23, 1955, if the claimant fails to show the discovery of a valuable mineral deposit within the limits of the claim.

SURFACE RESOURCES ACT--Continued

GENERALLY--Continued

A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to test a claim for discovery beyond examining the discovery points made available by the mining claimant.

United States v. Ruby LaRose Green, A-31031 (Mar. 25, 1970)

SURVEYS OF PUBLIC LANDS

GENERALLY

In a township where the interior section corner monuments cannot be found, the proper method of determining what land passed from the Government by patent is by proportionate measurement between existing and properly restored corners on the township boundaries.

In determining whether original survey corners were properly reestablished by an official dependent resurvey of public lands, the fact that the measured distance and bearing between two section corners as determined by the resurvey differs somewhat from the measurement and bearing given in the original survey is not sufficient alone to disprove the reestablishment of the corner, as discrepancies between measurements and bearings in old and more recent surveys are not uncommon.

Alfred Steinhauer, 1BLA-70-41 (Dec. 15, 1970)

DEPENDENT RESURVEYS

In a township where the interior section corner monuments cannot be found, the proper method of determining what land passed from the Government by patent is by proportionate measurement between existing and properly restored corners on the township boundaries.

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS--Continued

In determining whether original survey corners were properly reestablished by an official dependent resurvey of public lands, the fact that the measured distance and bearing between two section corners as determined by the resurvey differs somewhat from the measurement and bearing given in the original survey is not sufficient alone to disprove the reestablishment of the corner, as discrepancies between measurements and bearings in old and more recent surveys are not uncommon.

Alfred Steinhauer, IBLA-70-41 (Dec. 15, 1970)

TIMBER SALES AND DISPOSALS

Acts, as well as words, are to be considered in determining whether or not an offer has been accepted, and where, after an oral agreement has been made for the sale of timber, the purchaser indicates dissatisfaction with some terms imposed by the vendor but, nevertheless, cuts and removes the timber, the purchaser's actions are more reasonably construed as acts in the performance of a contract than as the repudiation of the oral agreement and the tortious taking of the timber.

A provision in a timber sale contract requiring advance payment for and the securing of written permission to cut additional timber, not included in the original contract, which the Government has agreed to sell, in the absence of language clearly indicating such intent, will not be construed as imposing a condition precedent to the formation of a contract; where, after it has been agreed by representatives of the Bureau of Land Management and the purchaser under such a contract that designated additional timber should also be cut, the purchaser cuts and removes the timber prior to making payment therefor and

TIMBER SALES AND DISPOSALS--Continued

prior to receiving permission to cut, his actions constitute a violation of the terms of the contract for which the Government is entitled to recover compensatory damages, but they do not constitute trespass.

Where a timber sale contract provides that the risk of loss shall be borne by the purchaser after the timber is cut, the purchaser is not, in the absence of an express modification of the contract provision, entitled to compensation for loss occasioned by the staining of timber between the time of cutting and harvesting, even though the cutting of the timber may have been done at a particular time, in part at least, to accommodate the Bureau of Land Mangement.

An adjustment in the price paid under a timber sale contract will not be made because the volume of timber conveyed is less than that called for in the contract where the contract provides that the purchaser shall be liable for the total purchase price regardless of whether the quantity is less than estimated.

Forest Management, Inc., A-31045 (Feb. 6, 1970)

Where the purchaser under a timber sale contract is charged by the Bureau of Land Management with a breach of contract requirements pertaining to the surfacing of roads and the purchaser contends that the requirements were orally modified by the parties and that it met the modified requirements, a hearing will be ordered to resolve the dispute as to the modification and the performance; however, if the purchaser does not wish a hearing and none is held, the determination that it breached the contract will stand since it has the burden of proving that the contract was orally modified.

Parker Industries, Inc., A-31018 (Feb. 6, 1970)

TOWNSITES

A settler residing on a lot within a townsite who is otherwise eligible to make a preemption entry is not to be denied his preference right on the ground that his entry is within a flood plane where the order opening the townsite to disposition made no reference to the exclusion of lots from disposition for that or any other reason.

Don Holzhey, A-31070 (Jan. 28, 1970)

An appellant asserting a preference right to purchase a lot in Zortman Townsite, Montana, must show that he had maintained on the lot an actual residence in which he was residing on the date of final proof; the use of a house on a lot for occasional weekends and vacation purposes does not constitute "actual residence."

Marjie I. Kalal, A-31116 (Mar. 3, 1970)

TRESPASS

GENERALLY

The cutting and removing of timber which has not been designated for cutting constitutes trespass for which, in the absence of a finding that the trespasser acted willfully or maliciously, double damages are properly imposed in the State of California.

A provision in a timber sale contract requiring advance payment for and the securing of written permission to cut additional timber, not included in the original contract, which the Government has agreed to sell, in the absence of language clearly indicating such intent, will not be construed as imposing a condition precedent to the formation of a contract; where, after it has been agreed by representatives of the Bureau of Land Management and the purchaser under such a contract that designated additional timber should also be cut, the purchaser cuts and removes the timber prior to making payment therefor and

TRESPASS--Continued

GENERALLY--Continued

prior to receiving permission to cut, his actions constitute a violation of the terms of the contract for which the Government is entitled to recover compensatory damages, but they do not constitute trespass.

Forest Management, Inc., A-31045 (Feb. 6, 1970)

MEASURE OF DAMAGES

The cutting and removing of timber which has not been designated for cutting constitutes trespass for which, in the absence of a finding that the trespasser acted willfully or maliciously, double damages are properly imposed in the State of California.

Forest Management, Inc., A-31045 (Feb. 6, 1970)

WITHDRAWALS AND RESERVATIONS

GENERALLY

The general rule governing changes in reservation boundaries is that when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress; no authority exists for an administrative change in reservation boundaries. Whether Congress intended to change a reservation boundary by an act would be reflected primarily by the act itself and its legislative history. Sale of land within the boundaries of the Fort Berthold Indian Reservation pursuant to Congressional authority did not change the boundaries nor remove the land from reservationstatus.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

WITHDRAWALS AND RESERVATIONS

EFFECT OF

Since a withdrawal made by Public Land Order 4582 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

Louis J. Hobbs, A-31051 (Jan. 15, 1970)
77 I. D. 5

POWER SITES

A mining claim located before August 11, 1955, on land partly within an existing powersite withdrawal is null and void ab initio as to that land.

T. L. and George F. Bruckner, A-31105 (Mar. 25, 1970)

REVOCATION AND RESTORATION

The general rule governing changes in reservation boundaries is that when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress; no authority exists for an administrative change in reservation boundaries. Whether Congress intended to change a reservation boundary by an act would be reflected primarily by the act itself and its legislative history. Sale of land within the boundaries of the Fort

WITHDRAWALS AND RESERVATIONS--Continued

REVOCATION AND RESTORATION--Continued

Berthold Indian Reservation pursuant to Congressional authority did not change the boundaries nor remove the land from reservationstatus.

Boundaries of the Fort Berthold Indian Reservation in North Dakota, M-36802 (Mar. 13, 1970)

WORDS AND PHRASES

"Valid Existing Rights." Since a withdrawal made by Public Land Order 4582 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation to the cancellation is premature and must be rejected.

Louis J. Hobbs, A-31051 (Jan. 15, 1970)
77 I. D. 5

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